

**113th Session**

**Judgment No. 3151**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 18 August 2009, the EPO's reply of 10 December 2009, the complainant's rejoinder of 10 March 2010, corrected on 18 March, and the Organisation's surrejoinder of 28 June 2010;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant is a French national born in 1956. He joined the European Patent Office, the EPO's secretariat, in November 1987 as an examiner at grade A2 in The Hague (Netherlands). He was promoted to grade A3 with effect from 1 July 1990.

On 28 September 2005 he submitted a request for review to the President of the Office in which he contested the decision of 1 July 2005

to promote him to grade A4 with immediate effect, which, he argued, should have been given retroactive effect. On 16 December 2005, following an unsuccessful conciliation meeting held in November 2005, he filed a second request for review, contesting his staff report for the period from 1 January 2002 to 31 January 2003. By a letter of 20 June 2005 the Administration informed the complainant that the President had decided to amend his contested staff report. Having subsequently been notified that his promotion to grade A4 would be made retroactive from 1 July 2004, he lodged a third request for review on 15 November 2007, contesting the amount that he had received in salary arrears as a result of that decision on the ground that it did not include any interest. In the meantime, in September, he received a second version of his staff report for 2002-2003 which was signed by the Principal Director, acting as both reporting officer and countersigning officer. On 12 November he wrote to the Administration stating that he had noted some errors and omissions and hence could not accept that report.

In its opinion of 1 April 2009 the Internal Appeals Committee, to which the three appeals had been referred, stated that it had decided to join them as they were interconnected. It unanimously recommended that a new version of the complainant's staff report for the period from 1 January 2002 to 31 January 2003 should be drawn up, either by re-evaluating each aspect of his performance or, if he agreed, by using the version of the staff report established for the period 2000-2001 as a basis for the 2002-2003 evaluation. It added that the new staff report should be submitted to the Promotion Board to determine whether the complainant's date of promotion to grade A4 should be earlier than 1 July 2004, in which case he should be paid salary arrears with interest at the rate of 8 per cent per annum. The Committee also unanimously recommended reimbursing the complainant's reasonable costs upon presentation of bills. With respect to the claim for moral damages, the majority of the Committee's members recommended rejecting it, but one member recommended paying him 1,000 euros for each of his first two appeals, given that more than two years had elapsed since he had filed them.

By a letter of 29 May 2009 the Director of Regulations and Change Management notified the complainant that the President had decided to endorse the Committee's recommendation to allow his appeals in part. Consequently, the complainant's former Principal Director would re-evaluate his performance and complete a new staff report for the period from January 2002 to January 2003 by adding comments, particularly in Parts III and V. The appraisal would be countersigned by the Vice-President in charge of Directorate-General 1 (DG1). Furthermore, in accordance with the Committee's recommendation, the new version of the staff report would be forwarded to the Promotion Board and, in the event that the Board proposed that his promotion should take effect from a date earlier than 1 July 2004, the Office would pay him salary arrears together with interest at the rate of 8 per cent per annum. He would also be paid reasonable costs upon receipt of written evidence, but the President had decided to endorse the majority's recommendation not to award him moral damages. The complainant impugns the letter of 29 May before the Tribunal.

In July 2009 the complainant wrote four letters to various members of the Administration, including the Director of Regulations and Change Management and the President, expressing surprise at the fact that he had not yet received a final decision from the President despite the fact that the Internal Appeals Committee had made its recommendations several months earlier. He asked to be given the name of the staff member who had requested that the aforementioned Director inform him on 29 May of the President's decision. He also requested that the President take a final decision on his internal appeals without further delay. By a letter of 28 July 2009 the Director of Regulations and Change Management replied that, in accordance with Article 109(1) of the Service Regulations for Permanent Employees of the European Patent Office, the President had already taken her final decision on his three internal appeals and, in accordance with the usual practice, he had notified him of that final decision by the letter of 29 May. He added that, as indicated in that letter, the Office would submit the revised version of his staff report to the Promotion Board as soon as it was finalised.

B. The complainant contends that he has received no “proper, formal, official and final” decisions concerning his three internal appeals, and he objects to the fact that the letter of 29 May 2009 was signed by the Director of Regulations and Change Management and not by the President. Indeed, Article 109(1) of the Service Regulations provides:

“If the President of the Office or, where appropriate, the Administrative Council considers that a favourable reply cannot be given to the internal appeal, an Appeals Committee as provided for in Article 110 shall be convened without delay to deliver an opinion on the matter; the authority concerned shall take a decision having regard to this opinion. Extracts from the decision may be published.”

He emphasises that although he made several requests in July 2009 for clarification as to the author of the decision of 29 May or proof of a delegation of authority, he has not yet received an adequate reply from the Administration.

The complainant alleges that he was prejudiced. He points out that although the initial assessment of his performance for the period from 1 January 2002 to 31 January 2003 proved to be incorrect, and that there was a decision in the letter of 29 May to reassess his performance, the new version of his staff report has not yet been prepared. Also his promotion to grade A4 would have occurred earlier had his staff report for 2001-2002 not been flawed. He alleges further prejudice because of the delay in dealing with his internal appeals. He explains that his first internal appeal was filed more than two years before the Internal Appeals Committee issued its opinion and that the matter at issue, i.e. his staff report, dates back to 2003. Referring to the Tribunal’s case law, he contends that he is entitled to moral damages in that respect. He also contends that he is entitled to moral damages with respect to the “gross misassessment” of his performance in his staff report for 2002-2003.

The complainant asks the Tribunal to order the President of the Office to take a final decision on his three internal appeals and to sign it; alternatively, he requests that the EPO provide proof of a delegation of authority by the President. He also claims moral damages and costs.

C. In its reply the EPO produces a document to support its assertion that the impugned decision was taken by the competent authority, i.e. the President. It emphasises that the date of the complainant's promotion to grade A4 was backdated to 1 July 2004 and that the salary arrears to which he was entitled as a result were paid to him with interest.

With respect to alleged undue delay, the Organisation acknowledges that the internal appeal proceedings exceeded two years, but it points out that the complainant's case was not straightforward and that he submitted a substantial amount of information. It adds that the complainant's first appeal was not necessary, since the promotion decision depended on his staff report, which was the subject of his second appeal. Moreover, since his three appeals were interconnected, the Internal Appeals Committee decided to join them and issued a single recommendation, which took some time. The Organisation asks the Tribunal to order the complainant to bear his costs.

D. In his rejoinder the complainant presses his pleas. He reiterates that the main purpose of his complaint is the absence of a final decision from the President. He indicates that he did not merely request proof that the President had taken a final decision on his internal appeals, but also evidence that she drafted it and signed it. He stresses that, in relation to another internal appeal he had lodged, he received a letter signed by the President herself, which dispelled any doubt as to the identity of the author of the decision. With respect to the document produced as "proof" that the decision of 29 May was taken by the President, the complainant points out that it is impossible to assert that the "curved graphic" under the part entitled presidential "signature" was produced by the President. He further indicates that, on 18 January 2010, he wrote to the President asking her to endorse the aforementioned document by means of a "clear and unambiguous" signature, but his letter remained unanswered. He therefore disputes the evidential value of that document.

In addition, on 5 February 2010 he asked the Chairman of the Internal Appeals Committee to grant him access to the minutes of

the hearing of 12 February 2009 concerning his three internal appeals. However, the Chairman refused to grant his request and the complainant contests that decision as well.

E. In its surrejoinder the Organisation maintains its position. It states that the document it submitted with its reply, which contained the proposed final decision to be taken with respect to the complainant's three internal appeals, clearly shows that the President agreed to the proposal by writing "I agree" and by initialling the document. As to the alleged delay in dealing with his internal appeals, it stresses that the complainant himself asked for an extension of the time limit to file some of his submissions. Lastly, it contends that the request for disclosure of the minutes of the hearing is irreceivable for failure to exhaust internal remedies and that, in any event, these minutes are confidential and are used only by the Internal Appeals Committee for drawing up its opinion.

#### CONSIDERATIONS

1. The complainant lodged three internal appeals dated 28 September 2005, 16 December 2005 and 15 November 2007, regarding respectively, the date of his promotion to grade A4, his staff report for the period 1 January 2002 to 31 January 2003, and a request for 10 per cent interest per annum on salary arrears due to the retroactive promotion.

The Internal Appeals Committee unanimously recommended, in its opinion dated 1 April 2009, that the three appeals, which it had decided to join, should be allowed in part. In particular, it unanimously recommended that a new version of the complainant's staff report for 2002-2003 should be drawn up by re-evaluating each aspect of his performance, or alternatively, and subject to the complainant's approval, by referring to the previous reporting period, i.e. 2000-2001. It also recommended that the new staff report should be submitted to the Promotion Board to determine whether the complainant's date of promotion should be earlier than 1 July 2004, in

which case he should be paid salary arrears with interest at the rate of 8 per cent per annum. With respect to the claim for moral damages, the majority of the Committee's members recommended rejecting it, while one member recommended awarding the complainant 1,000 euros in moral damages for each of the first two appeals in view of the excessively long time taken by the Organisation to reply to those two appeals.

2. By a letter dated 29 May 2009 and signed by the Director of Regulations and Change Management, the complainant was notified that the President of the Office had decided to follow the Committee's recommendation to allow his appeals in part (i.e. that a new version of his contested staff report would be drafted and forwarded to the Promotion Board). He was also notified that his other claims, in particular his claim for moral damages, had been rejected and that, with regard to his staff report for 2002-2003, the President had decided to follow the first option offered by the Committee. The Director indicated that the reporting officer would be his previous Principal Director and the countersigning officer the Vice-President in charge of DG1 and that the new version of his staff report would be submitted to the Promotion Board under Article 49(4b) of the Service Regulations. If the Board proposed to promote him to A4 with retroactive effect from a date earlier than 1 July 2004, the Office would pay the salary arrears with 8 per cent interest per annum. Furthermore, in accordance with Article 113(7) of the Service Regulations, the Office would also pay him reasonable legal costs incurred in the course of the appeal proceedings upon receipt of the relevant proof. That decision is impugned before the Tribunal.

3. The complainant asks the Tribunal to order the President of the Office to take and sign a final decision on his three internal appeals or, alternatively, to ask the Tribunal to order the Organisation to provide proof of delegation of authority by the President. He also asks to have access to the minutes of the hearing held with respect to his three internal appeals and to be awarded moral damages and costs.

4. The complainant alleges that the EPO did not produce evidence that the decision of 29 May was taken by a person to whom authority had been delegated by the President. He contests the decision not to award him moral damages with respect to his staff report for the period from 1 January 2002 to 31 January 2003 and the “gross misassessment of work performed”. He adds that he also suffered injury because of the delay in dealing with his case.

5. The EPO submits that during the two years that elapsed between the filing of the complainant’s first appeal and the submission of its reply to the Internal Appeals Committee, it drafted a new staff report and backdated the complainant’s promotion by a year. It also points out that the complainant’s appeal “was not straightforward, and the amount of information and submissions he produced was substantial”. It adds that the majority of the members of the Committee did not recommend an award of moral damages for the delay. Also, regarding delays, the defendant notes that the complainant himself asked for the extension of certain deadlines throughout the internal appeal proceedings. The Organisation asserts that it is standard practice for the Director of Regulations and Change Management to sign letters (such as that of 29 May 2009) informing staff members of the President’s decision.

6. The Tribunal notes that the complaint raises the following issues: the characterisation of the letter of 29 May 2009 as an official decision of the President of the Office; entitlement to moral damages for the delays in the internal appeals procedure; entitlement to damages for the unlawful staff report, and access to the minutes of the hearing of 12 February 2009.

The letter of 29 May 2009 constitutes the official communication of the President’s decision to follow the Internal Appeals Committee’s recommendation. As the Director of Regulations and Change Management has the authority to communicate such decisions, there is no need for the President’s signature to be on the letter. The complainant’s arguments to the contrary are unfounded. Furthermore, his assertions that the decision was taken *ultra vires*, or without



delegation are inconsistent with the facts. In accordance with the standard practice, often used in international organisations, the aforementioned letter specifies that “[the Director of Regulations and Change Management was] asked to inform [the complainant] that the President has decided”, which is a clear indication that the Director was not taking the decision himself, but was merely communicating the President’s decision to the complainant. This is consistent with the case law (see Judgments 2833, under 3, and 2915, under 14). As such, the claims regarding delegation of authority and lack of an official decision by the President, are unfounded.

7. The claim for an award of moral damages for the delays in the internal appeals procedure is likewise unfounded. The Tribunal does not consider the date of the first appeal (28 September 2005) to be the initial date for determining the duration of the appeals procedure. Indeed, the first appeal contested the promotion decision which was based on the staff report contested in the second appeal. It must be considered that only 18 months elapsed between 16 December 2005, the date on which the second appeal was filed by the complainant, and 20 June 2007, the date on which the Administration wrote to him indicating that the President had decided to amend his staff report. This was followed by the letter of 14 August 2007 informing the complainant that the President had decided to accept the Promotion Board’s recommendation to backdate his promotion by one year, i.e. to 1 July 2004. A delay of 18 months is reasonable in the particular circumstances of this case, as in that period of time the Organisation reviewed two appeals and decided to replace the contested acts with two new decisions implicitly setting aside the contested decisions. Hence, within a reasonable time, the complainant received substantially all that he had requested in the two appeals. In this case, as the conciliation procedure is outside the internal appeals procedure, it cannot be taken into account in the calculation of the delay in the internal appeals procedure.

8. Regarding the complainant’s request for disclosure of the minutes of the hearing held concerning his three internal appeals, the

Tribunal notes that it was raised for the first time in the rejoinder of the present proceedings. It is therefore irreceivable owing to a failure to exhaust internal means of redress.

9. As for the complainant's claim for moral damages made with respect to the two unlawful staff reports, it is founded. The first staff report was implicitly annulled by the second staff report of September 2007 and the second, which was signed by the Principal Director acting as both reporting officer and countersigning officer, was annulled by the impugned decision communicated by the letter of 29 May 2009. The Tribunal considers that the Organisation itself, by amending the two staff reports, considered them unlawful. Therefore, an award of moral damages is appropriate, even if the new version of the staff report reaches the same or a similar conclusion to the previous reports. The Tribunal sets their amount at 2,000 euros.

10. As the complainant succeeds in part, the Tribunal will award him costs in the amount of 500 euros.

#### DECISION

For the above reasons,

1. The EPO shall pay the complainant moral damages in the amount of 2,000 euros.
2. It shall also pay him costs in the amount of 500 euros.
3. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 10 May 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2012.

Seydou Ba  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet