

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

116th Session

Judgment No. 3268

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P.A.C. R. against the European Patent Organisation (EPO) on 21 October 2010 and corrected on 15 January 2011, the EPO's reply of 5 May, the complainant's rejoinder of 14 June and the EPO's surrejoinder of 30 September 2011;

Considering Article II, paragraph 5, 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 and the pleadings may be summed up as follows:

A. The complainant joined the European Patent Office, the EPO's secretariat, on 1 November 1996 as a search examiner at grade A2. He was promoted to grade A3 on 1 December 2000. In 2004 and 2005 he also acted as a staff representative, having been selected by the Staff Committee to be a member of the General Advisory Committee.

Since the year 2000, when the duties of search and substantive examiners were merged, patent applications have been processed by

one and the same examiner, from the time that they are filed up to the possible grant of a patent. The complainant started to work according to this new method in February 2002. The time devoted to his training (hereinafter “the learning curve”) was deducted from the working hours used as a basis for calculating his productivity.

In his staff report for 2004-2005, the complainant received the overall rating “good”. In the section concerning productivity his reporting officer commented:

“[B]elow average productivity, but it is still within the lower limit of ‘good’ and can be explained by the effort devoted to substantive examination, furnished in ‘core tasks’ time reduced by other activities.”

The countersigning officer agreed with the rating, but in part VII of the report he said that the complainant should focus more on core tasks and increase his production and productivity. In his comments, the complainant expressed his disagreement, wished to have the term “average” replaced with wording which seemed to him to be clearer and requested the deletion of the phrase “but it is still within the lower limit of ‘good’” and of the countersigning officer’s comment. The reporting officer objected to the deletion of the above-mentioned phrase but not to the new wording proposed by the complainant. In his final comments the countersigning officer said that he also agreed with that proposal, but maintained his comment. He stated that he agreed with the complainant’s comments and those of the reporting officer with regard to the deletion of the above-mentioned phrase.

The complainant signed his staff report on 29 December 2006. On the same date, as he considered that the report was unclear, he wrote to the President of the Office to request its redrafting. He was informed by a letter of 28 February 2007 that his request had not been granted and that the matter had been referred to the Internal Appeals Committee. The Committee issued its opinion on 1 June 2010. It considered that the appeal was irreceivable in part, insofar as the alternative wording suggested by the complainant to replace the word “average” had been introduced into his staff report in June 2009.

The majority of Committee members recommended that the appeal should be rejected as unfounded, and the Committee unanimously recommended an award of 300 euros to compensate for the moral injury suffered by the complainant on account of the excessive length of the internal appeal proceedings. The complainant was informed by a letter of 27 July 2010 that the President of the Office had decided to endorse the Committee's opinion. That is the impugned decision.

B. The complainant explains, with regard to the deletion of the phrase “[Productivity] is still within the lower limit of ‘good’”, that the learning curve was not long enough to ensure that examiners who had to undergo training after the duties of search and substantive examiners had been merged received equal treatment in relation to other examiners. He alleges that the curve had a “distorting effect” on his productivity – an effect which allegedly led the EPO to alter the method for calculating examiners' productivity – which was magnified when an examiner performed additional duties such as representing the staff. He relies on the dissenting opinion of two members of the Internal Appeals Committee in order to submit that, in his case, the code of practice intended to help directors to assess the productivity of examiners under their authority was incorrectly applied.

The complainant further deplores the fact that, in his final comments, the countersigning officer did not clarify the comment which he had made in part VII of the staff report. He takes the countersigning officer to task for having displayed bad faith and submits that the latter's comments implied that he should devote less time to his activities as a staff representative. In his view, these comments therefore breach Article 34(2) of the Service Regulations for Permanent Employees of the European Patent Office, which provides that the duties undertaken by members of the Staff Committee “shall be deemed to be part of their normal service”.

Lastly, the complainant criticises the EPO for having based its opinion purely on statistical data when concluding that his

productivity was “within the lower limit of ‘good’”. In his view it was in the “middle range” of that rating.

The complainant requests the setting aside of the impugned decision and the drafting of a new staff report for 2004-2005 in which the two disputed passages shall be deleted. He also asks the Tribunal to award him damages in the amount of 5,000 euros for the delay in the internal appeal proceedings and the breach of Article 34(2) of the Service Regulations. Lastly, he claims “compensation for the expenses” he has incurred.

C. In its reply the EPO points out that it is well established in the Tribunal’s case law that issues raised in staff reports are essentially “discretionary”. It states that the complainant’s learning curve was spread out over two years and ten months, rather than just two years, which enabled him to obtain a higher productivity and hence a more favourable rating for 2004-2005. It infers from this that the reporting officer’s assessment was correct. It emphasises that, in the instant case, the Tribunal’s role is not to express an opinion on the soundness of the marking system, but to determine whether it was correctly applied. It considers that the code of practice was followed, arguing if the complainant’s productivity had been calculated in accordance with a purely statistical approach the marking would have been less favourable.

In addition, the EPO considers that the complainant has offered no proof of bad faith on the part of the countersigning officer and that the latter’s final comments do not reveal any intention to denigrate the complainant’s duties as staff representative.

D. In his rejoinder the complainant disputes the EPO’s calculations.

E. In its surrejoinder the EPO maintains its position in full. In its opinion the complainant’s productivity was calculated correctly and the comment of the countersigning officer in the disputed staff report is “covered by [his] freedom of expression”.

CONSIDERATIONS

1. The complainant joined the service of the EPO on 1 November 1996 as a search examiner at grade A2. He was promoted to grade A3 on 1 December 2000.

At the material time (2004-2005), he worked as an examiner in the field of television signal transmission systems using pulse code modulation and also acted as a coach. With the EPO's agreement, he was selected by the Staff Committee to sit on two joint committees.

2. The examination of patent applications comprises two phases: documentary research, to identify prior art *inter alia*, and substantive examination. These operations were formerly entrusted successively to two separate examiners: the first working in Directorate-General 1 (DG1 – Search) and the second in Directorate-General 2 (DG2 – Examination/Opposition).

As from the year 2000, the examination of patent applications was merged, with the result that only one examiner now processes each application from start to finish. This new method, known as BEST (Bringing Examination and Search Together), was applied to the complainant, who was assigned to DG1, as of February 2002. Like other “DG1 migrants”, for a period of two years, some of his time was spent receiving training in substantive examination. The time devoted to that training, which was evaluated as a standard, fixed amount (hereinafter “the learning curve”), was deducted from the working hours of the examiners concerned so that it would not adversely affect the periodic assessment of their productivity.

3. Employees' staff reports are governed in particular by Article 47 of the Service Regulations, paragraph 1 of which stipulates that the ability, efficiency and conduct in the service of each permanent employee, with the exception of those in grades A7 and A6, shall be the subject of a report made at least once every two years under the conditions established by the President of the Office. The

general guidelines on reporting contained in Circular No. 246, which were adopted pursuant to that Article, explain that the aim of the operation is to ensure that the performance and abilities of individual staff members are fairly and objectively evaluated so that, with the passage of time, they have a reasonable chance of moving to more responsible work and securing access to a higher grade. The fact that a single standard form is used in order to promote fairness and objectivity does not, however, mean that line managers may overlook the particularities of certain kinds of work to which attention may be drawn in the parts of the form intended for that purpose (paragraphs (2) and (3) of the guidelines).

4. The overall rating given to an employee must bear in mind work done (quality and productivity), aptitudes (job-related aptitude, specialist knowledge and knowledge of official languages), attitude to work and dealings with others. In accordance with a code of practice, how examiners in DG1 and DG2 perform their core tasks is measured in CBF (Complete BEST File) points, these being obtained mathematically by adding together actions completed in the fields of search and substantive examination. The total is expressed as a productivity factor. The introduction to the code of practice makes it clear, however, that the productivity factor is merely one of the assessment tools available to reporting officers and directors; it should not be regarded as a mathematical fact which can be converted directly into a marking without taking into account the specificities of the tasks entrusted to the person in question or of the surrounding circumstances.

5. In the staff report drawn up on 6 April 2006 for the period 1 January 2004 to 31 December 2005, the complainant's overall performance was assessed in the following words:

“[A]n examiner who tries to get things moving, especially with regard to documentation.

He has managed his migration to substantive examination rather well, despite less time being spent on [core tasks] owing to other activities. These good tendencies have still to be confirmed as far as productivity is concerned.”

In keeping with this assessment, the reporting officer gave the complainant the rating “good” on a five-point scale rising from “insufficient”, to “less than good”, “good”, “very good” and “excellent”.

6. (a) The quality of his work was rated as “very good” and described in the following terms:

“[He] has a good knowledge of his technical field.

His good knowledge of IT tools and databases enables him to carry out high-quality research.

His search reports and *comptes rendus de recherches* are precise and contain useful information for the future.

He has made progress in assimilating examination concepts and mastering the examination procedure as a whole, including oral proceedings and refusals.

As a coach he has provided patient, thorough support to a new examiner who is experiencing some difficulties.”

(b) On the other hand, his productivity was rated only as “good” with the following comment:

“In 2004 and 2005, in 236 days (learning curve deducted) 34.21 CBF points were achieved, reflecting 49 searches and 15 final examination actions. This is below average productivity, but it is still within the lower limit of ‘good’ and can be explained by the effort devoted to substantive examination, furnished in ‘core tasks’ time reduced by other activities.”

At the complainant’s request, the word “average” was later replaced by “the EAP revised in February 2003”, the EAP (Expected Average Productivity) being a reference value for measuring productivity. This point, which was initially challenged, is no longer in dispute.

(c) The complainant received the rating “good” for his job-related aptitude and his specialist knowledge and the rating “very good” for his knowledge of the Organisation’s official languages. He received the same rating for his attitude to work and his dealings with others.

(d) On 25 April 2006 the countersigning officer expressed the following opinion:

“Agreed. [The examiner] should focus more on his core tasks [...] and increase his production and productivity. I am convinced that he is able to do so.”

7. In addition to the modification which he obtained thereafter, as mentioned in consideration 6(b), the complainant requested the deletion of the reporting officer’s comment “but it is still within the lower limit of ‘good’” and also the deletion of the two sentences following the word “Agreed” in the above-mentioned opinion.

He emphasised that the assessment of his productivity had been incorrect, because the learning curve had been applied according to a method which had been substantially modified after 2005 on account of the distortions it caused. He criticised the countersigning officer’s opinion, because devoting more time to his core tasks would necessarily imply scaling back his additional duties as a staff representative, and this appeared to him to be incompatible with the Office’s general policy.

Both proposed amendments were refused.

The reporting officer acknowledged that, as from 2005, the period covered by the learning curve had been raised from two to four years, since the ProPro II (Production-Productivity) method applied to the complainant’s staff report had been replaced by a new method in order to mitigate the distortion resulting from the fact that the time devoted to training a substantive examiner affected the working hours on which the productivity evaluation was based. But this change concerned only newly recruited examiners and not “DG1 migrants” such as the complainant. In order to reduce the effect of this distortion as far as possible, the learning curve applied when evaluating the complainant’s productivity had been lengthened by ten months (compared with the standard, two-year period then required by the rules), which had upped his productivity for the entire 2004-2005 reporting exercise.

The countersigning officer explained that his sole intention had been to invite the complainant to invest more of his intellectual skills in core tasks in the time available.

8. The majority of the members of the Internal Appeals Committee, to which the internal appeal filed by the complainant on 29 December 2006 was referred, recommended that the appeal should be dismissed. However, it unanimously recommended an award of damages in the amount of 300 euros for the moral injury suffered by the complainant on account of the excessive length of the appeal proceedings.

On 27 July 2010, the President of the Office endorsed these recommendations. That is the impugned decision.

9. 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 marks given to the employee have been worked out in full conformity with the rules, but it cannot substitute its own opinion for these bodies' assessment of the qualities, performance and conduct of the person concerned. The Tribunal will therefore interfere in this field only if the decision was taken without authority, if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts, or if it was taken in breach of a rule of form or procedure, or if there was abuse of authority (see Judgments 2834, under 7, and 3006, under 7). This limitation on the Tribunal's power of review naturally applies to both the mark given in a staff report and the comments accompanying that mark in the report.

10. The complainant challenges the disputed staff report only in respect of its assessment of his productivity, which was evaluated on the basis of the ProPro II method, that was then used to determine the relationship between an employee's available working hours and the number of searches, examinations and oppositions completed by that person.

The application of this method led the reporting officer to award the complainant the mathematical factor of 0.72. This productivity

was described as being within the lower limit of the mark “good”, and it was this rather negative remark that led the countersigning officer to conclude that the complainant should make an effort to improve his productivity in respect of his core tasks.

11. The complainant submits that the productivity factor applied was incorrect and that, as a minority of members of the Internal Appeals Committee concluded, the application of the above-mentioned factor put his productivity in the middle range of the rating “good” rather than within its lower limit.

Regardless of the merits of these statements, it must be found that the difference in assessment is not insignificant. In Communiqué No. 9 of 23 December 2005, concerning the 2004-2005 reporting exercise, the President of the Office drew the attention of line managers to the absolute priority to be given to reporting because it affected promotion (section III, third sentence). Even if the complainant did receive the rating “good” for his productivity, the accompanying comment is disparaging, since the lower limit of “good” is very close to the upper limit of “less than good” which is synonymous with “only just adequate”.

12. The restraint which the Tribunal must exercise when it is called upon to examine a staff report (see consideration 9, above) does not mean that it can disregard the fact that the comment accompanying the complainant’s productivity rating considerably detracts from the marking “good” and that the countersigning officer’s comments underscore that effect. A reader might well infer from those comments that the complainant, whose human, technical and professional abilities were highlighted in other sections of the report, was remiss in that he neglected his core tasks to some extent in favour of additional activities.

This adverse finding is plainly the result of the excessive importance attached to a mathematical formula which is merely one factor which, on its own, does not give a complete picture of the

complainant's performance. As is clear from the introduction to the code of practice mentioned above (see consideration 4), no assessment should be based solely on this figure when new, transitional and complex situations arise, such as those facing the complainant during the 2004-2005 reporting exercise. This is, however, precisely what the reporting and countersigning officers did in failing to take account of an essential, relevant fact and giving priority to a calculation which is not enough to justify the unfavourable assessment of the complainant's productivity.

Although the report does mention some special circumstances, such as the complainant's additional activities and his training time, it does not take sufficient account of the fact that these additional activities were undertaken in the interests of the Organisation and with its approval, or of the fact that the complainant's training time was a significant distorting factor, even though the reporting and countersigning officers were both aware of this problem which ultimately led the EPO to replace the ProPro II system.

13. It follows from the foregoing that the complaint must be allowed and that the impugned decision and the disputed staff report must be set aside.

14. It will be incumbent upon the EPO to draw up a new staff report in which the phrase "within the lower limit of 'good'" in section I(2)(i) of the report and the two sentences after the word "Agreed" in section VII of the report are deleted – and not replaced with equivalent terms.

15. Damages in the amount of 4,000 euros, including the 300 euros mentioned in the impugned decision, must be awarded to the complainant to redress the injury which he has suffered on account of the disputed report and the length of the internal appeal proceedings.

16. The complainant, who requests compensation for his expenses, is entitled to costs which shall be set at 1,000 euros.

DECISION

For the above reasons,

1. The decision of 27 July 2010 and the complainant's staff report for the period from 1 January 2004 to 31 December 2005 are set aside.
2. The EPO shall proceed as indicated under 14, above.
3. It shall pay the complainant damages in the amount of 4,000 euros as stated under 15, above.
4. It shall also pay him 1,000 euros in costs.

In witness of this judgment, adopted on 7 November 2013, Mr Claude Rouiller, Vice-President of the Tribunal, Mr Seydou Ba, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Claude Rouiller
Seydou Ba
Patrick Frydman
Catherine Comtet