

B. (No. 8)

v.

EPO

120th Session

Judgment No. 3512

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 12 July 2011, the EPO's reply of 6 February 2012, the complainant's rejoinder of 19 June and the EPO's surrejoinder of 27 July 2012;

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 a warning letter from his reporting officer, which warned him that he was at risk of receiving markings of less than "good" in his forthcoming staff report.

The complainant joined the EPO in 1987 as an examiner at grade A2. He was promoted to grade A3 in 1990 and to grade A4 in 2004.

The complainant had discussions with his reporting officer in February, April, May and June 2010 concerning the deterioration of his performance in 2010. It emerged that the complainant's decrease in productivity was due at least in part to the considerable amount of time he was spending on legal matters, which were not part of his duties as an examiner. The reporting officer suggested that the

complainant work on these legal matters in his own time, and he set an objective of one search or final action per five working days in order for the complainant to gradually return to an acceptable level of performance.

By a letter dated 19 July 2010 the complainant's reporting officer notified him that, in accordance with the General guidelines on Reporting set out in Circular No. 246, he was at risk of receiving markings of less than "good" for his productivity, attitude and overall rating in his forthcoming staff report, if his performance failed to improve. The letter stated that in spite of all efforts and support provided, the complainant had so far produced only one search in 2010. As this was considered to be far below the productivity expected of an examiner of his experience, the reporting officer had decided to issue a formal warning letter. If the complainant did not meet the expectations of one search or final action per five working days, the reporting officer would have no option but to issue a negative staff report. The complainant was informed that this would have an adverse effect on his career, and could ultimately even lead to disciplinary measures for professional incompetence, pursuant to Article 52 of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "the Service Regulations"). To help the complainant achieve what was expected of him, monthly meetings were to be held with his reporting officer. He was invited to inform his reporting officer of any exceptional circumstances which might apply, and was reminded that the Occupational Health Physician was available in case of medical problems.

By a letter of 22 July 2010 to his reporting officer, the complainant contested the warning letter and asked that it be withdrawn. This request was denied by his reporting officer in a letter of 17 August 2010.

On 20 January 2011 the complainant wrote to the Principal Director of his Directorate requesting the cancellation of the warning letter of 19 July 2010. The Principal Director replied on 25 January, confirming that the letter of warning was fully justified in view of his inadequate and deteriorating performance. He referred to their earlier conversations concerning the complainant's substandard performance

and reminded him that if the warnings had no effect, disciplinary measures would have to be taken.

By letters dated 3 February 2011 and 24 February 2011 addressed to the Vice-President of Directorate General 1 (DG1) and to the President of the EPO, respectively, the complainant requested that the warning letter be withdrawn and indicated that he would prefer it if an amicable settlement could be reached.

The complainant asks the Tribunal to quash the warning letter of 19 July 2010 and to award him moral damages and costs. The EPO rejects all the complainant's claims as irreceivable and, on a subsidiary basis, as entirely unfounded.

CONSIDERATIONS

1. The complainant received a formal warning letter, under Circular No. 246, dated 19 July 2010 from the Director of Directorate 1248, his reporting officer, stating inter alia that if the complainant did not meet the expectations outlined in the letter by the end of the reporting period, the Director would be forced to issue a negative staff report for the period 1 January 2010 to 31 December 2010. Specifically, the markings under the headings "productivity", "attitude" and "overall performance", would be less than "good". Referring to the possibility of the complainant not meeting his objectives and receiving less than "good" markings, the reporting officer pointed out, as per the standard form warning letter, that this would have negative consequences on the complainant's career and, in the most extreme situation, that it might lead to dismissal under Article 52 of the Service Regulations. The complainant sent a letter dated 22 July 2010 to his Director contesting the warning letter and requesting its cancellation. His Director confirmed the warning letter in a letter dated 17 August 2010. In a letter dated 20 January 2011 to the Principal Director of his Directorate, the complainant again requested the cancellation of the warning letter. In his reply dated 25 January 2011, the Principal Director confirmed the warning letter. The complainant then wrote to

the Vice-President of DG1, in a letter dated 3 February 2011, requesting the cancellation of the warning letter.

The complainant filed the complaint with the Tribunal on 12 July 2011. In his complaint form, he indicates that no express decision was taken, within the deadline provided for in Article VII, paragraph 3, of the Tribunal's Statute, on the claim that he notified to the EPO on 23 February 2011. In a letter dated 23 February 2011, the complainant had written to the President of the EPO requesting the cancellation of the warning letter.

2. The complaint is irreceivable *ratione materiae*. The complainant essentially contests a warning letter, which warned him that he was at risk of receiving a marking of less than "good" under three headings in his staff report for the period 1 January 2010 to 31 December 2010, if he did not improve within the following five months. The warning letter of 19 July 2010 is not a final decision adversely affecting the complainant within the meaning of Article VII, paragraph 1, of the Statute of the Tribunal. The letter constituted a step in the procedure which leads to the drafting of the staff report and ends with the final confirmation of the report. The warning letter as prescribed in Circular No. 246 is meant to alert an employee to the risk of receiving a marking of less than "good" on their forthcoming staff report and to give them adequate time to improve and hence avoid such a marking. The complainant could not therefore rely on Article VII, paragraph 3, of the Tribunal's Statute to file a complaint against the refusal to withdraw the warning letter.

3. The Tribunal is satisfied that the complainant challenges a decision which is not a final decision in accordance with Article VII, paragraph 1, of the Tribunal's Statute. A series of steps or findings which lead to a final decision may be attacked as part of a challenge to the final decision, but they themselves cannot be the subject of a complaint to the Tribunal (see Judgments 2366, under 16, and 3433, under 9).

4. In light of the above considerations, the Tribunal finds that the complaint is irreceivable and must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 21 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ