H. (No. 2)

v.

EPO

129th Session **Judgment No. 4257**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr H. H. against the European Patent Organisation (EPO) on 19 August 2016, corrected on 14 October 2016, the EPO's reply of 13 March 2017, the complainant's rejoinder of 18 May, the EPO's surrejoinder of 30 August, the complainant's additional submissions of 16 October and the EPO's final comments of 20 December 2017;

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 oral proceedings;

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

The complainant challenges his staff report for 2014.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat, who works as an examiner at the Office's sub-office in Berlin. In 2014 the procedure for drawing up the periodic staff reports required under Article 47 of the Service Regulations for permanent employees of the Office was governed by Circular No. 246, entitled "General guidelines on Reporting". On 24 March 2015 the complainant was notified, in accordance with Section B(1) of that circular, that his staff report for the period 1 January to 31 December 2014 was due. The notification also indicated the names of his reporting

and countersigning officers. That same day, the complainant requested that his countersigning officer be replaced, as he suspected him of partiality. He said that his suspicions were based on incidents that had occurred during an earlier reporting period (1 January to 31 August 2012), as well as the views expressed by the countersigning officer in his staff report for that period and during the ensuing conciliation procedure, and the latter's decision to close the unit dealing with his technical field in Berlin.

Having attended a prior interview with his reporting officer, as foreseen by Section B(4) of Circular No. 246, on 26 March 2015 the complainant received his 2014 staff report, signed by the reporting officer and by the countersigning officer. He obtained the rating "good" for all aspects of his performance, but the reporting officer commented, under the headings "productivity" and "attitude to work and dealings with others", that the rating was "in the lower range of 'good'". In his comments on the report, the complainant observed that his request to replace the countersigning officer had not been addressed, and he objected to what he described as the "unsubstantiated comments" of the reporting officer and the countersigning officer and the "wrong conclusion" of the reporting officer regarding his productivity. As the reporting and countersigning officers maintained their comments, the complainant requested a conciliation procedure under Section D of Circular No. 246.

On 8 April the complainant was informed that his request to replace the countersigning officer was rejected on the grounds that he had "not submitted any convincing evidence that [the countersigning officer] acted impartially (sic) during the reporting period in question". On 27 April he was advised that the conciliation procedure that he had requested would be conducted in accordance with Section B(11) of Circular No. 366, entitled "General Guidelines on Performance Management", which had entered into force on 1 January 2015. By an email of 28 April, the complainant informed his reporting and countersigning officers that he would be accompanied by a staff representative at the conciliation meeting. However, the countersigning officer replied that this would not be possible as the procedure set out in Circular No. 366 did not foresee the participation of any person other than the staff member, the reporting officer and the countersigning officer.

During the conciliation meeting, which took place on 13 May 2015, the reporting and countersigning officers agreed to make two changes to the complainant's staff report, but the complainant considered them to be insufficient and he therefore raised an objection with the Appraisals Committee. The Committee met on 11 March 2016 and issued its report on 9 May. It concluded that the objections raised by the complainant should be rejected and the report confirmed, as he had not established that the assessment of his performance was discriminatory or arbitrary. By a letter of 18 May 2016, the Vice-President of Directorate-General 4 informed the complainant of the final decision on his 2014 staff report: in accordance with the unanimous recommendation of the Appraisals Committee, the report was confirmed. That is the impugned decision.

In the course of the proceedings, the complainant was informed by letter of 29 August 2017 that, as a gesture of goodwill and in an effort to resolve the dispute amicably, the Office had decided to modify the final decision on his 2014 staff report and to amend the report in light of the Tribunal's ruling in Judgment 3692, by removing references to "the lower range of 'good'".

The complainant asks the Tribunal to set aside the impugned decision, to declare the opinion of the Appraisals Committee null and void, to declare his 2014 staff report arbitrary and discriminatory, to set aside his 2014 staff report and order its removal from his personal file, and to order that a new report be drawn up and signed by impartial officers, with all negative comments deleted. He also asks the Tribunal to recognise the partiality of his reporting and countersigning officers, to declare that the "retroactive application" of Circular No. 366 was illegal, and to declare that the Administrative Council's decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 are illegal. He claims compensation of 20,000 euros for moral and financial damage caused by the 2014 staff report, plus an additional 1,000 euros per month until a new 2014 staff report is drawn up. Lastly, he seeks compensation for any "real damage", such as the denial of step advancement in 2015 based on the 2014 staff report.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable and otherwise unfounded.

CONSIDERATIONS

1. The complainant was, at relevant times, a member of the staff of the EPO employed as an examiner. In these proceedings commenced by complaint filed on 19 August 2016, the complainant challenges his staff report for the period 1 January 2014 to 31 December 2014 (the 2014 staff report).

2. The Tribunal notes at the outset that the regulatory framework within the EPO for creating and reviewing staff reports was amended with effect from 1 January 2015. Before that date, the framework was embodied in Circular No. 246 and on and from that date the framework was, with one qualification, embodied in Circular No. 366. The qualification is that Circular No. 366 contained a transitional provision declaring that Circular No. 246 would still apply to staff reports covering the period up to 31 December 2014 "as far as concerns the content of the staff report and the procedure up to Part X of the report". However the same transitional provision declared that the new procedures in Circular No. 366 for conciliation and subsequent steps for reports relating to that earlier period, would apply. The supersession of the former Circular by the latter Circular occurred at a time when a new career system was introduced in the EPO by decision of the Administrative Council of 11 December 2014 (CA/D 10/14) effective 1 January 2015.

3. The role of the Tribunal in challenges to the assessment of the performance of staff of international organisations is a limited one and does not involve reassessment of performance by the Tribunal (see, for example, Judgments 3228, consideration 3, and 3692, consideration 8). The Tribunal will shortly discuss the complainant's contentions concerning the substance of the staff report but having regard to this confined role.

4. However it is desirable to address what is a threshold issue, namely the lawfulness of Circular No. 366 that established the new framework under which the 2014 staff report was reviewed and the

lawfulness of Article 110a of the Service Regulations introduced by CA/D 10/14. Under the old framework established by Circular No. 246 a staff member who disagreed with the content of a staff report could request a conciliation procedure conducted by a mediator. That began with a meeting between the mediator and the staff member, who could be accompanied by an "expert" of her or his choice. A list of experts was established for each reporting period, half being appointed by management, the other half by the staff representation. Thereafter a non-compulsory second meeting could take place. The mediator, staff member (who could be accompanied by the expert), reporting officer and countersigning officer would attend this meeting. Any agreement reached at this meeting would be presented to the competent Vice-President for approval leading to the creation of a final report for signature. If the staff member was dissatisfied with the outcome, she or he could lodge an appeal with the Internal Appeals Committee.

5. Several features of the procedure just discussed were removed or altered by Circular No. 366. If a staff member contests the contents of a staff report then a meeting is held between the staff member, the reporting officer and the countersigning officer. No mediator is involved nor is there provision for the staff member to be accompanied by an expert or anyone else. If dissatisfied with the result, the staff member can raise an objection with the Appraisals Committee, the members of which are appointed by the Administration. Its mandate is confined to determining whether the appraisal was arbitrary or discriminatory. Unless the Committee decides otherwise, the procedure is a written one. The Committee's assessment is submitted to the competent authority for final decision. Thereafter there is no procedure for review by way of internal appeal.

6. The lawfulness of the new procedure is challenged by the complainant in a number of ways. First he argues that the EPO acted unlawfully by applying Circular No. 366 retroactively to his detriment and he cites Judgment 3185. Secondly he appears to argue that the new procedure does not provide an impartial review of the staff report which includes, ultimately, review by an appeals committee with management and staff representatives in equivalent numbers. Thirdly he argues that

Article 110a of the Service Regulations introduced by CA/D 10/14 and Circular No. 366 breached acquired rights and legitimate expectations.

7. Allied to these arguments is an argument of the EPO that the complainant is limited as to the subject matter he can challenge having regard to the fact that Article 110a of the Service Regulations introduced by CA/D 10/14 and Circular No. 366 are general decisions which are not amenable to challenge unless and until a decision is made detrimentally affecting the complainant.

8. The last-mentioned argument of the EPO is founded on settled case law. The EPO cites Judgment 3291, consideration 8. A more recent illustration is Judgment 4075, consideration 4. However in the present case Article 110a of the Service Regulations introduced by CA/D 10/14 and Circular No. 366 have been applied in an individual decision affecting the complainant, namely the application of the new procedures to the review of his grievances about the terms of the 2014 staff report and the involvement in its preparation of individuals he alleges were not impartial. Accordingly, the complainant can challenge the lawfulness of those general decisions.

9. One other argument of the EPO of a similar character should be briefly addressed. It argues, correctly, that the complainant cannot challenge the decision to deny him a step advancement in 2015 as this was a separate decision, even if based directly or indirectly on the 2014 staff report, which has not been challenged by way of internal appeal.

10. The complainant's first argument that the EPO acted unlawfully by applying Circular No. 366 retroactively should be rejected. The case he cites, Judgment 3185, is plainly distinguishable on the facts and the principle it establishes does not apply to the facts of this case. In that matter a written performance assessment had been made on 16 December 2008 (signed by the staff member concerned on 5 January 2009) of the latter's performance for the period 18 December 2007 to 16 December 2008. The regulatory framework for performance assessments was changed on 22 April 2009. A further assessment was made of the staff member's performance for the period 1 April 2008 to 31 March 2009 under the new regulatory framework. The Tribunal concluded this was unlawful

for two reasons. The first was that the principle of non-retroactivity was breached by the application of the new regulatory framework (operative from 22 April 2009) to the evaluation period covered by the report of 16 December 2008. The second and related reason was that by the second assessment the defendant organisation had disturbed a situation that had become established under the earlier rules.

11. In the present case, the 2014 staff report was prepared under the provisions of Circular No. 246, being the provisions which had been operative during the reporting period. It is of no real moment for present purposes that the immediate legal foundation for the application of the provisions of Circular No. 246 was the transitional provision in Circular No. 366. The fact that on and from 1 January 2015, the procedures for reviewing a staff report were those in Circular No. 366 and not those in Circular No. 246 does not involve the unlawful application of retroactive provisions. As the Tribunal observed in Judgment 2315, consideration 23, in general terms, a provision is retroactive if it effects some change in existing legal status, rights, liabilities or interests from a date prior to its proclamation, but not if it merely affects the procedures to be observed in the future with respect to such status, rights, liabilities or interests. At best for the complainant, the latter observation about the future is applicable. But it must be borne in mind that the 2014 staff report was created after 1 January 2015 and challenged thereafter and it may be doubted that any issue of retroactive operation truly arises at all.

12. The complainant's second argument is that the new scheme does not provide an impartial review of the staff report which includes, ultimately, review by an appeals committee with management and staff representatives in equivalent numbers. In substance, two issues emerge from this argument. The first is that the Appraisals Committee is, under the new regulatory framework, limited to considering whether the staff report was arbitrary or discriminatory. The second is that the grievance cannot be further pursued by way of internal appeal. As to this second point, the Tribunal has repeatedly spoken of the desirability of effective internal appeal mechanisms (see Judgment 3732, consideration 2, and the cases cited therein). However the Tribunal has not said it is mandatory and

a precondition to the exercise of jurisdiction by the Tribunal in relation to final decisions that all such decisions are subject to internal appeal.

13. As to the complainant's argument about the limited role of the Appraisals Committee, it is not self-evidently a flaw in the framework. As the Tribunal has said in relation to its own role, the assessment of an employee's merit during a specified period involves a value judgement (see, for example, Judgment 3692 referred to earlier). By parity of reasoning, it would be reasonable for an organisation to adopt an approach that individuals (such as those comprising the Appraisals Committee) reviewing a staff report prepared by a staff member's supervisor involving value judgements would not be as well-placed to make the same value judgements but, in order to guard against abuses of the process, would have authority to assess whether the report was arbitrary or discriminatory. And while staff would understandably prefer the membership of the Appraisals Committee to include staff representation and not be limited to management, the fact that it is so limited does not render its constitution in this way, unlawful.

14. In his third argument, the complainant argues that Article 110a of the Service Regulations introduced by CA/D 10/14 and Circular No. 366 breached acquired rights and legitimate expectations. However, it is settled case law that the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of acquired rights when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted the appointment. The amendment to the applicable text must relate to a fundamental and essential term of employment (see, for example, Judgment 4028, consideration 13). The alterations to the processes of review effected by CA/D 10/14 and Circular No. 366 were not of this character. Accordingly, this argument is rejected.

15. In his pleas (apart from the matters already discussed) and having regard to the limited role of the Tribunal in proceedings concerning staff appraisals, the complainant raises only one issue arguably of substance about process. The Appraisals Committee's report dated 9 May 2016

addresses the complainant's arguments about partiality. One aspect of the complainant's basic thesis was that the countersigning officer was antipathetic towards him and, thus, was not impartial. The Committee appears to have accepted, correctly, that consideration of whether the staff report was authored by individuals who were partial was a matter comprehended by its role in assessing whether the report was arbitrary or discriminatory.

16. In its report the Committee said: "As to the allegation of partiality, as confirmed in the staff report (Part IX(ii)), the issue was addressed by a letter of 08.04.2015." That letter, to the complainant, was from the "Director 4.3.4 Recruitment & Talent Management". It addressed a request by the complainant that the person who in fact ultimately countersigned the 2014 report be replaced. The letter referred to an email from the complainant dated 24 March 2015 and then described the request in the following terms: "[Y]ou request the replacement of [Mr B.] as countersigning officer on your staff report covering the period 01.01.14 – 31.12.14." After saying that the complainant's request could not be granted, it concluded with the comment "[i]t is considered that you have not submitted any convincing evidence that [the countersigning officer] acted impartially (sic) during the reporting period in question". It is possible that the expression "reporting period in question" was a reference to the reporting period referred to earlier in the letter, namely the period 1 January to 31 December 2014. However in the complainant's email of 24 March 2015 (to which the letter of 8 April 2015 was responding), he complains specifically about events "during the reporting period of 01.01.2012 – 31.08.2012". So the expression may have been a reference to this earlier period. In his brief the complainant effectively says it was a reference to the 2014 reporting period, and that appears not to be challenged by the EPO in its pleas.

17. Having regard to the foregoing, the Appraisals Committee's reliance on the letter of 8 April 2015 involved focusing on conduct of the countersigning officer in the period to which the 2014 staff report ultimately related rather than earlier conduct relied on by the complainant both in his brief and communications with the Administration. This was an error. The complainant had drawn the Committee's attention to his

version of those earlier events. If an official involved in the preparation of a staff report is not impartial and that can be demonstrated by prior conduct, the fact that the conduct took place some years earlier does not render that prior conduct irrelevant when assessing partiality. Partiality is not necessarily periodic or episodic and can be enduring. In addition, it may be doubted that the Appraisals Committee could, without investigating the matter itself, simply rely on a short letter from management to satisfactorily deal with the question of partiality.

18. However, even if the review process was flawed, it is necessary to consider the fate of this complaint having regard to the position adopted by the EPO in its surrejoinder and which was the subject of later correspondence to the Tribunal. The EPO has agreed to withdraw the staff report to which these proceedings relate, and to place on the complainant's personal file an amended staff report in which a number of the comments critical of the complainant have been deleted. It is not suggested that the two officials who signed the original 2014 staff report have subscribed to this amended staff report. Indeed the substance of the amendments is to remove references to the complainant's performance and related matters being in the "lower range of 'good'". Yet the comments of the countersigning official are based, either expressly or by implication, on the premise that the complainant's performance was in the "lower range of 'good'".

19. The substance of the relief sought concerning the 2014 staff report is that it be set aside and removed from the complainant's personal file. That has already happened, but well after the complaint was filed, by administrative action. No orders to this effect need be made. However the complainant has succeeded in the sense that some of his arguments have been accepted. Accordingly he is entitled to his costs. In the unusual circumstances of this case, the complaint should be dismissed but an order for costs made in favour of the complainant.

DECISION

For the above reasons,

1. Subject to order 2, the complaint is dismissed.

2. The EPO shall pay the complainant 750 euros costs.

In witness of this judgment, adopted on 4 November 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ