

E. (No. 5)

v.

EPO

136th Session

Judgment No. 4713

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Ms M. E. against the European Patent Organisation (EPO) on 25 August 2016 and corrected on 25 October, the EPO's reply of 16 March 2017, the complainant's rejoinder of 4 July 2017 and the EPO's surrejoinder of 16 October 2017;

Considering the EPO's further submissions of 13 July 2018 and the complainant's final comments thereon of 15 October 2018;

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

Having examined the written submissions;

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

The complainant challenges her staff report for 2014.

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, entitled "General Guidelines on Reporting", and, on and from that date, the framework was, with one qualification, embodied in Circular No. 366, entitled "General Guidelines on Performance Management". 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 would apply to reports relating to that earlier period. The supersession of the former circular by the latter circular coincided with the introduction of a new career system in the EPO by Administrative Council decision CA/D 10/14 of 11 December 2014, effective 1 January 2015.

The complainant is a permanent employee of the European Patent Office, the EPO’s secretariat, since 2003. On 23 March 2015, she received an invitation to a prior interview in relation to her staff report for the period from 1 January to 31 December 2014. The following day, having been informed about the names of the reporting and countersigning officers, she requested that those officers be replaced as she had “objective reasons to suspect their partiality”.

The prior interview took place on 25 March 2015, and the complainant received her staff report signed by her reporting and countersigning officers on 26 March with the markings “good” under all sections. By a letter of 1 April, also sent by email on 13 April, the complainant’s request for the replacement of the reporting and countersigning officers was rejected on the ground that she had failed to submit any convincing evidence that the officers had acted partially during the reporting period. She submitted her written comments in the staff report objecting, among other things, to the partiality of the reporting and countersigning officers and requesting that her report be quashed and that a new report be drawn up and signed by impartial officers “with at least all negative comments deleted and the grades continued from the reporting period 2011, the last report that was drawn up by impartial officers”.

On 15 April 2015, after the complainant had received the final comments from the reporting and countersigning officers, she requested that a conciliation procedure be initiated. A meeting took place on 20 May, following which the staff report was confirmed. On 5 June 2015, she raised an objection with the Appraisals Committee seeking, among other things, an award of moral damages in the amount of 1,000 euros per month until the drawing up of a new staff report.

In its opinion of 9 May 2016, the Appraisals Committee recommended that the complainant's objection be rejected and her staff report for 2014, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter of 18 May 2016, the Vice-President of Directorate-General 4 (DG4) informed the complainant of his decision to follow those recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to declare that (1) the Appraisals Committee's opinion is null and void, (2) Circular No. 366, decision CA/D 10/14 and Article 110a of the Service Regulations are illegal and (3) her staff report is arbitrary and discriminatory. She requests that her staff report be quashed and removed from her personal file and that a new report be drawn up and signed by impartial officers. She further seeks moral and financial damages, costs and the payment of 8 per cent compound interest on all amounts due.

The EPO challenges the receivability of some of the complainant's claims and requests that the complaint be dismissed as partly irreceivable and unfounded. Should the Tribunal decide to set aside the staff report, it notes that such ruling would be deemed to afford sufficient redress to the complainant.

CONSIDERATIONS

1. In the decision contained in a letter of 18 May 2016, which the complainant impugns, the Vice-President of Directorate-General 4 (DG4) accepted the opinion of the Appraisals Committee and its conclusion that the complainant had provided no evidence, or even arguments, to substantiate her contention that the assessment of her performance in her 2014 staff report was discriminatory or arbitrary. The Vice-President also accepted the Appraisals Committee's recommendations to reject the complainant's objection and to confirm her 2014 staff report. He noted that the report should be deemed final and placed on her personal file, together with a copy of the Committee's opinion.

2. The regulatory framework for staff reports for the 2014 cycle was provided in Circular No. 246. It was however replaced by Circular No. 366 with effect from 1 January 2015 for the 2015 cycle and onwards. At the same time as this latter circular took effect, the Administrative Council issued decision CA/D 10/14, which introduced a new career system for the EPO. It notably redesigned the classification of jobs and grades; the conditions of step advancement; the promotion procedure and the performance management system. Article 37 of decision CA/D 10/14 amended Article 109(3) of the Service Regulations to exclude appraisal reports from the review procedure as had been the previous position. Article 39 of decision CA/D 10/14 inserted Article 110a into the Service Regulations, under the heading “Objection procedure for appraisal reports”. Article 110a(1) stated that, in case of disagreement on an appraisal report, the parties to the dispute shall endeavour to settle it through conciliation. Article 110a(2) stated that an employee who is dissatisfied with her or his appraisal report at the outcome of the conciliation may challenge it by raising an objection with the Appraisals Committee. Article 110a(4) stated that the Appraisals Committee “shall review whether the appraisal report was arbitrary or discriminatory”. Article 110a(5) stated that the competent authority shall take a final decision on the objection, having due regard to the assessment of the Appraisals Committee. Article 38 of decision CA/D 10/14 amended Article 110(2) of the Service Regulations to exclude appraisal reports from the internal appeal procedure before the Internal Appeals Committee.

3. Circular No. 366 contained a transitional provision, which relevantly stated as follows:

“C. ENTRY INTO FORCE AND TRANSITIONAL MEASURES

- (1) This Circular shall enter into force on 1 January 2015 and apply to the performance management cycle and resulting appraisal reports from that date onwards.
- (2) Circular [No.] 246, as amended on 17 December 2013, shall 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. The conciliation procedure and the subsequent steps shall

be replaced by the procedure described in the present circular from [Section] B(11).”

The conciliation procedure was set out in Section B(11), and the “subsequent steps”, referred to in Section C(2) above, involving an objection procedure before an Appraisals Committee, were set out in Sections B(12) and B(13). These provisions stated as follows:

“B. PERFORMANCE MANAGEMENT CYCLE

[...]

(11) Conciliation

As soon as possible after notification that the staff member is not in agreement with the report, the countersigning officer must plan a conciliation meeting with the staff member and the reporting officer in order to reach agreement.

At the end of the conciliation procedure, the report is either amended or confirmed. The reporting officer forwards the final version of the appraisal report to the staff member, if applicable after implementation of the agreed changes and final validation by the countersigning officer.

The outcome of the conciliation is summarised by the countersigning officer and communicated to the staff member and the reporting officer.

In case of failure by the staff member to attend the conciliation meeting, the reporting and countersigning officers may proceed in the staff member’s absence.

The whole process, from notification that the staff member is not in agreement with the report to the return of the appraisal report to the staff member, possibly after amendment, may not exceed 20 working days.

Should the staff member not receive the appraisal report back within this time frame, he may consider the lack of reply as a refusal to amend the appraisal report.

(12) Objections with the Appraisals Committee

If, after receiving the appraisal report following conciliation with the reporting and countersigning officers or after the time limit mentioned in the previous section has expired, the staff member

- (a) does not wish to pursue the matter, he must confirm this and send the report to [the Principal Directorate Human Resources].
- (b) is still dissatisfied with his appraisal report and wishes to pursue the matter, he must within ten working days request that the matter be taken further by raising an objection with the Appraisals Committee via the electronic tool, stating in writing the grounds for the objection and the relief claimed. The appraisal report, together with the summary

of the outcome of the conciliation procedure, is then sent via the reporting officer to [the Principal Directorate Human Resources], which forwards it to the Appraisals Committee.

If the staff member does not respond within the above time limit, the report will be deemed complete. [The Principal Directorate Human Resources] will then close the procedure.

(13) Objection procedure

- (1) The procedure before the Appraisals Committee is a written procedure, unless otherwise decided by the Committee.
- (2) The Appraisals Committee examines the objections and reviews whether the appraisal report was arbitrary or discriminatory.
- (3) The assessment of the Appraisals Committee is submitted to the competent authority for a final decision on the objection.
- (4) The final decision taken is forwarded to the staff member, the reporting officer and the countersigning officer, together with the assessment of the Appraisals Committee.
- (5) If the decision is to confirm the report, it will be deemed final and will be filed in the personal file by [the Principal Directorate Human Resources].
- (6) If the decision is to amend the report, the reporting officer will be responsible for implementing the decision in the electronic tool and communicating the report to the staff member after validation by the countersigning officer. The staff member must acknowledge receipt of the amended report within fifteen working days and return it to [the Principal Directorate Human Resources], for filing in his personal file.”

4. As a precursor to considering the complainant’s request to set aside the impugned decision on procedural and substantive grounds, some preliminary procedural matters will be addressed. The complainant requests that oral proceedings be held. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and of the relevant evidence. That request is therefore rejected. The complainant’s request for the disclosure of the files for three European patent applications is also rejected as those documents do not appear to have any bearing on the merits of her case.

5. The complainant's request that the Appraisals Committee's opinion dated 9 May 2016 be declared null and void is irreceivable as, in itself, that opinion was merely a preparatory step in the process of reaching the final decision, which the complainant impugns. Established precedent has it that such an advisory opinion does not in itself constitute a decision which may be impugned before the Tribunal (see, for example, Judgments 4637, consideration 5, and 3171, consideration 13).

6. The EPO's submission on the irreceivability of the complainant's request that the Tribunal declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal is also rejected. Inasmuch as the Tribunal's case law states that complainants can impugn a decision only if it directly affects them, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to them, they are not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action (see, for example, Judgment 4563, consideration 7, and the case law cited therein).

7. The EPO submits that the complainant's claim for compensation for financial damages is irreceivable because, by that claim, she intends to request compensation for loss of career advancement related to the decision not to promote her in 2015, which is a separate and distinct decision. The Tribunal however notes that such details as the complainant provides to support her claim for compensation do not refer specifically to her non-promotion in 2015. The complainant's claim is receivable but unfounded.

8. Procedurally, the complainant asks the Tribunal to set aside her 2014 staff report by declaring illegal what she refers to as the retroactive application of Circular No. 366 to the dispute which arose from her challenge to that report. She argues, in effect, that, inasmuch as the assessment of her performance was carried out under Circular No. 246, which was in effect during 2014, the subsequent procedures which arose out of her challenge to the 2014 staff report should also have been governed by Circular No. 246, rather than by Circular No. 366,

which came into effect on 1 January 2015. This argument is unfounded. In consideration 10 of Judgment 4637, delivered in public on 1 February 2023, quoting Judgment 4257, the Tribunal concluded that the application of the conciliation and objection procedures provided in Circular No. 366 to a 2014 staff report did not effect any change in legal status, rights, liabilities or interests from a date prior to its proclamation and so was not applied retroactively.

9. The complainant further argues that the conciliation and objection procedures under Circular No. 366 are defective and that the system to deal with disagreements before the Appraisals Committee is defective in itself because Article VII, paragraph 1, of the Tribunal's Statute is to ensure that the Tribunal continues as a final appellate body and does not become *de facto* a trial court for staff grievances. In her view, this implies that the disagreements should be first considered by a first instance quasi-judicial body, such as the Internal Appeals Committee, as obtained under the prior system; the Appraisals Committee, which under Article 110a(3) of the Service Regulations is comprised exclusively of management representatives, is not such a quasi-judicial body. She argues that, moreover, Article 110a(4) of the Service Regulations limits the mandate of the Appraisals Committee to determining whether a staff report is discriminatory or arbitrary, and does not permit a complete review of the report. In the complainant's view, this creates a legal void that amounts to a denial of justice. She insists that the EPO cannot, by means of Article 110a of the Service Regulations in effect, restrict the Tribunal's scope of review. These arguments are also unfounded as, in considerations 11 to 14 of Judgment 4637, the Tribunal rejected as unfounded similar arguments which were proffered against the background of the same legal framework in similar circumstances.

10. It follows from the foregoing that the complainant's request for an order declaring decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal is rejected.

11. As a precursor to considering the merits of the assessment of the complainant's 2014 staff report, the Tribunal finds it convenient to repeat the following statement which it made in Judgment 4564, consideration 3, concerning the limited power of review that it exercises in the matter of staff appraisals:

“[A]ssessment 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 ratings given to the employee have been determined in full conformity with the rules, but it cannot substitute its own opinion for the assessment made by these bodies of the qualities, performance and conduct of the person concerned. The Tribunal will therefore intervene only if the staff report was drawn up without authority or in breach of a rule of form or procedure, if it was based on an error of law or fact, if a material fact was overlooked, if a plainly wrong conclusion was drawn from the facts, or if there was abuse of authority.”

In Judgment 4637, having recalled that statement, the Tribunal observed, in consideration 13, that:

“Since the Tribunal's power of review does not extend to determining as such whether appraisals are well founded, the fact that the Appraisals Committee's power of review is itself confined to assessing whether an appraisal report is arbitrary or discriminatory does not affect the Tribunal's power of review, which continues to be exercised on the same terms as previously.”

12. The complainant submits, in effect, that she did not obtain the markings and the overall rating she should have obtained because of bias or partiality on the part of her reporting and countersigning officers, which markings and rating the Appraisals Committee did not properly consider because of its limited review mandate. However, quite apart from the Tribunal's finding that the restriction of the Committee's mandate to determine whether a staff report is arbitrary or discriminatory does not in itself render the procedure flawed (see Judgment 4637, consideration 13, referring to Judgment 4257, considerations 12 and 13), the complainant, who bears the burden to provide evidence of sufficient quality and weight to persuade the Tribunal that her allegations of bias or partiality are well founded (see, for example, Judgments 4543,

consideration 8, and 3380, consideration 9), has not discharged that burden. Her case of bias, partiality or prejudice on the part of her reporting and countersigning officers is based essentially on disagreements between her and those officers on management decisions and instructions they issued, which the complainant saw as an interference in the work of her division and its processing of patent applications, among other things. In the Tribunal's view, they do not amount to bias, partiality or prejudice, which disqualified those officers from carrying out their assessment of the complainant's 2014 performance.

13. It follows from the foregoing that the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

CLÉMENT GASCON

DRAŽEN PETROVIĆ