

H. (No. 20)

v.

EPO

136th Session

Judgment No. 4714

THE ADMINISTRATIVE TRIBUNAL,

Considering the twentieth complaint filed by Mr W. H. H. against the European Patent Organisation (EPO) on 2 June 2016 and corrected on 16 June, the EPO's reply of 5 October 2016, the complainant's rejoinder of 29 November 2016 and the EPO's surrejoinder of 13 March 2017;

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 his 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, holding the post of examiner since 1989. From 2006 to 2014, he was an appointed member of the General Advisory Committee (GAC). On 28 March 2014, the Administrative Council adopted decision CA/D 2/14 replacing the GAC by the General Consultative Committee (GCC) with effect from 1 July 2014.

As part of his performance appraisal for the period from 1 January to 31 December 2014, the complainant had a prior interview with his reporting officer on 18 February 2015. A first version of the report was signed by the latter on 20 February and by the countersigning officer on 22 March 2015. The complainant received the markings "very good" for the quality of his work and his attitude to work and dealings with others, and "good" for his productivity, job-related aptitude and for the overall rating. Disagreeing with some aspects of his report, he submitted written comments on 25 March. The reporting officer provided his final comments on 31 March, rejecting the complainant's comments, and the countersigning officer, who agreed with the reporting officer, signed the report on 2 April 2015. No amendment was made.

On 15 April 2015, the complainant requested that a conciliation procedure be initiated. A meeting took place on 28 April, following which a slight amendment to the report was made in the section on job-related aptitude. Nonetheless, on 26 May 2015, he raised an objection with the Appraisals Committee and raised several procedural issues relating, among other things, to the application and lawfulness of Circular No. 366. He requested that the dispute be resolved in accordance with Circular No. 246, that the markings "good" in his report be changed to "very good", and that he be awarded moral damages and costs.

In its opinion of 2 February 2016, the Appraisals Committee recommended that the complainant's objection be rejected and his staff report for 2014, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter of 18 March 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, his staff report for 2014, as well as Circular No. 366 and Articles 109(3)(b) and 110(2)(e) of the Service Regulations. He further seeks an order that the case be sent back to the EPO for "a proper internal remedy procedure" to be undertaken, as well as moral damages and costs.

The EPO argues that the complaint is irreceivable insofar as the complainant challenges decision CA/D 10/14 introducing Articles 109(3)(b) and 110(2)(e) of the Service Regulations, as that claim was already raised in another complaint filed by him, which was dismissed by the Tribunal in Judgment 4256, delivered in public on 10 February 2020. Concerning the claim for compensation, the EPO considers that no moral injury has been established but, should the Tribunal decide to set aside the staff report, such alleged injury would be sufficiently redressed. Accordingly, the EPO requests that the complaint be dismissed as partly irreceivable and unfounded.

CONSIDERATIONS

1. This complaint is the culmination of the complainant's challenge to his staff report for the period 1 January to 31 December 2014, which his reporting officer and countersigning officer signed on 20 February 2015 and 22 March 2015, respectively. In it, the quality of the complainant's work, as well as his attitude to work and dealings with others, were assessed as "very good". His productivity, as well as his job-related aptitude, were assessed as "good" and his overall rating was "good". In his written comments to the assessment, the complainant stated that he should have been given a marking of "very good" for his

job-related aptitude, as he had received in his previous staff reports, since with added experience his aptitude could not have diminished. He also argued that he should have been given a marking of “very good” for productivity as there were “extenuating circumstances” justifying his slightly lower productivity value (0.23) compared to the reference examiner value (0.24). As a result of the conciliation procedure that followed, the complainant’s reporting and countersigning officers amended the job-related aptitude section in the staff report by changing the comment from “[t]he assessment is in the range of good” to “[t]he assessment is in the uppermost range of good”. The box marking for job-related aptitude, however, remained “good”, as did his overall rating.

2. Since the provisions applicable to this complaint are the same as those cited in Judgment 4713, also delivered in public this day, the Tribunal refers to considerations 2 and 3 of that judgment which contain those provisions, making it unnecessary to reproduce them in the present judgment.

3. The complainant raised an objection with the Appraisals Committee on 26 May 2015. In its 2 February 2016 opinion, which the Vice-President of Directorate-General 4 (DG4) endorsed in the impugned decision, the Appraisals Committee unanimously recommended that the complainant’s objection be rejected and the staff report be confirmed as there was no evidence that the assessment of his performance for the subject period was arbitrary or discriminatory, as he had alleged.

4. In its opinion, the Appraisals Committee observed that the complainant’s objections to his 2014 staff report were procedural to the extent that: (1) he challenged the use of the procedure contained in Circular No. 366 to resolve the disputes that arose out of a report drawn up under the prior Circular; (2) he asserted that the consultation procedure which led to the introduction of Circular No. 366 was flawed; (3) he argued that the conciliation and objection procedures contained in Circular No. 366 did not meet basic standards; and (4) he criticised the fact that, after a final decision was taken pursuant to Article 110a(5) of the Service Regulations, there was no further internal appeal

procedure. The Committee stated that the procedural objections raised by the complainant fell outside the scope of its mandate.

5. The Appraisals Committee also observed that, to the extent that the complainant objected to the substance of his 2014 assessment, he had already received partial relief in the conciliation procedure by the revision of the comment in the job-related aptitude section, which was revised to the uppermost range of “good”. The Committee also observed that the complainant’s remaining requests to adjust markings and to award an overall rating of “very good” were based on his submissions that: no quotas applied to box markings, the box marking for aptitude should have remained the same as for the previous year because his aptitude had not declined and, whilst his measured productivity went down, his actual productivity had increased. The Committee concluded that the complainant had provided no evidence nor arguments “to substantiate that [his] relative assessment based on the global performance of the service in 2014 ha[d] been discriminatory or arbitrary [and the] arguments raised by [him] indeed reflect[ed] more a relative and subjective divergence of views than an actual flaw in the assessment”.

6. In his complaint, the complainant asks the Tribunal to set aside the impugned decision and the staff report itself and to remit the case to the EPO for “a proper internal remedy procedure” to be undertaken. He also requests the setting aside of Circular No. 366 due to faulty consultation; the setting aside of those parts of the Circular which relate to the conciliation procedure and the Appraisals Committee procedure; the setting aside of the relevant parts of the EPO’s internal disputes system (that is, Articles 109(3)(b) and 110(2)(e) of the Service Regulations); and an award of moral damages and costs.

7. The EPO submits that the complaint is irreceivable insofar as the complainant challenges decision CA/D 10/14, which introduced Articles 109(3)(b) and 110(2)(e) of the Service Regulations, because he had challenged that decision in a prior complaint (which the Tribunal

dismissed in Judgment 4256). The complainant however points out that decision CA/D 10/14 is not the object of the present complaint.

8. The complainant's submission that his 2014 staff report should have been drawn up under Circular No. 246, rather than under Circular No. 366, does not accurately represent what occurred in the appraisal process. His 2014 staff report was in fact lawfully drawn up under Circular No. 246 as to its content. However, as the Tribunal confirmed in consideration 9 of Judgment 4637, delivered in public on 1 February 2023, quoting Judgment 4257, in keeping with the transitional measures (particularly by reference to Section C(2) of Circular No. 366), the conciliation and objection procedures contained in Sections B(11), B(12) and B(13) of Circular No. 366 were lawfully applicable to the relevant subsequent procedures in the 2014 staff appraisal process. It cannot therefore be maintained, as the complainant contends, that there are incompatibilities between Circular No. 246 and Circular No. 366, which render the latter unlawful or inapplicable to that process.

9. The complainant's contention, based on two submissions, that Circular No. 366 should not have been applied to resolve the dispute that arose from his 2014 staff report because that Circular was adopted by a flawed statutory consultation process, is also unfounded. There is no merit in his first submission that the Management Committee (MAC) members and the Vice-Presidents, who were members of the General Consultative Committee (GCC) in 2014, when the Circular was adopted, were not in a proper position to provide a valid opinion on the proposal which led to its adoption because (1) the MAC members were mandated by the MAC terms of reference to support the President's proposals (which means that they had "no room" to give anything other than a positive opinion on a proposal) and (2) the Vice-Presidents' contracts expressly excluded them from being members of the GCC. First, the contracts of the latter contained no such exclusion provision. Second, the terms of reference of the MAC in no way oblige MAC members to support the President's proposals. Moreover, nothing contained in Article 38 of the Service Regulations (in its 2014 applicable version) or in the composition of the GCC under it supports

a conclusion that the GCC was not validly constituted to carry out its mandate as a consultative body to the President for the subject purpose under Article 38(2) of the Service Regulations. In any event, the same reasoning recognizing the validity of the General Advisory Committee (GAC) balanced composition (see, for example, Judgments 3540, consideration 5, and 3534, consideration 5) applies for the GCC, which is equally composed by persons appointed by the President and by the Central Staff Committee.

Neither is there any merit in the complainant's second submission that the consultative process was flawed because the GCC was an inferior body to the GAC which it replaced after almost forty years as the latter was required to give a reasoned opinion on any proposal which affected staff members (as against mere consultation on the conditions of employment with the GCC) in which he had an acquired right to proper statutory consultation before Circular No. 366 was adopted. The amendment by which the GCC replaced the GAC as the consultative body to the President did not adversely affect the balance of contractual obligations, or alter fundamental terms of employment in consideration of which the complainant accepted his appointment, or which subsequently induced him to stay on and thus did not deny the complainant an acquired right under the Tribunal's case law stated, for example, in consideration 16 of Judgment 3074.

10. The complainant's submissions challenging the lawfulness of the constitution of the Appraisals Committee are unfounded in light of the Tribunal's determination in consideration 11 of Judgment 4637 that the Committee was lawfully constituted. So also are the submissions by which he challenges the Committee's impartiality. His suspicion of bias does not rest on any tangible, substantiated evidence of any kind. His submission to the effect that the Committee's mandate, which limits its review of staff reports to determine whether they were arbitrary or discriminatory, does not in itself render the procedure flawed, as the Tribunal determined on the same issue in consideration 13 of Judgment 4637. The complainant's further submission that, in light of the exclusion of the prior review and internal appeal procedure, the objection procedure before the Committee does not provide a proper

internal appeal procedure, nor an adequate adversarial process, nor adequately safeguards his right to be heard is also unfounded in light of the Tribunal's determination in consideration 12 of Judgment 4637 that the procedure is lawful. It is therefore unnecessary to grant the complainant's request to remit the matter to the EPO ordering it to carry out "a proper internal procedure in which [the complainant] can have confidence".

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 essentially repeats the arguments he had made when he urged the Appraisals Committee to adjust upwards the markings he was given for job-related aptitude and productivity in his 2014 staff report to "very good" and his overall rating to "very good" as well. He reiterates, for example, that his aptitude had not gone down

from what it was during the 2013 period when it was assessed as “very good” and it was difficult to understand how that marking could have gone down in a job in which experience was extremely important. He also argues, albeit without explanation, that his actual production had increased over what it was during the 2013 reporting period so that his productivity marking should not have been reduced for the 2014 period. In effect, whilst the complainant sets much store in his own subjective opinions, he does not present a case to persuade the Tribunal to find, in its limited power of review, that the Appraisals Committee wrongly recommended rejecting his objection and confirming his 2014 staff report as there was no evidence that the report was discriminatory or arbitrary, which was endorsed in the impugned decision.

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

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