

**K. (No. 11)**

**v.**

**EPO**

**136th Session**

**Judgment No. 4717**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr T. K. against the European Patent Organisation (EPO) on 2 September 2016, the EPO's reply of 13 March 2017, the complainant's rejoinder of 10 June 2017, corrected on 24 July, and the EPO's surrejoinder of 30 October 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, since 1991. On 23 March 2015, he received his staff report, dated 20 March, for the period from 1 January to 31 December 2014 reflecting an overall rating of "very good" and laudatory comments. Despite the glowing report, on 27 March, he submitted written comments objecting, among other things, to the authority of his reporting and countersigning officers, his administrative status, his job specifications and working conditions. He requested that a revised staff report be reissued, reflecting a change in his career group and meeting the requirements of Circular No. 246. In his final comments – with which the countersigning officer agreed – the reporting officer asserted that the reporting exercise was not "the appropriate forum to deal with the issue of job description, assignment, grade, etc." and assumed that the complainant agreed with the markings, overall rating and comments provided in his report, "so that the procedure [could] continue".

On 20 April 2015, the complainant requested that a conciliation procedure be initiated. He was informed of the application of Circular No. 366 for the review procedures. A conciliation meeting took place on 22 April, following which no agreement was reached. The conciliation meeting's draft text indicated that the complainant's staff report for 2014 was confirmed "only as far as the box markings and performance related comments [were] concerned" but the issues relating to his administrative status remained "unresolved". On 23 April, the complainant contacted the reporting and countersigning officers to suggest some modifications in the said draft text and requested that the conciliation procedure be conducted pursuant to Circular No. 246 rather than Circular No. 366. On the same day, he was informed that a decision had been taken not to change his staff report.

On 28 April 2015, the complainant raised an objection with the Appraisals Committee arguing that his comments and requests of 27 March had not been taken into account and stating that his staff report remained in an “unconfirmed” status as it “ha[d] neither been fully confirmed by the signatories of the conciliation [procedure] nor amended in any way following the joint conciliation meeting”. On 20 November 2015 and 30 May 2016, while the objection procedure was ongoing, the complainant inquired about the status of his staff report which, according to him, was “only partially confirmed”.

In its opinion of 18 May 2016, the Appraisals Committee noted that the complainant had not objected to the markings or performance-related comments in his report and recommended that his objection be rejected and his staff report for 2014, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter dated 15 June 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, as well as his staff report for 2014, to declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal, to repeal Circulars Nos. 355 and 356 insofar as impacting his right to have a fair and objective staff report, and a fair and impartial conflict resolution procedure, and to order that a new assessment of his performance be made by a true, impartial and quasi-judicial body, not only on grounds of “discrimination” and “arbitrariness”. He further seeks an award of “real”, moral and punitive damages and costs. He finally requests that the EPO be ordered to rectify the lack of official employment documentation and administrative data in his personal file.

The EPO argues that the complainant has no cause of action, that his complaint is irreceivable insofar as he is challenging general regulations and decisions, or his administrative status, and that most of his claims are either outside the scope of the Tribunal’s jurisdiction, or unrelated to the present dispute, or time-barred. It asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, unfounded, and

to order that the complainant bear all the costs he has incurred in bringing these proceedings and part of the Organisation's costs in an amount left to its discretion.

### CONSIDERATIONS

1. In the decision contained in a letter of 15 June 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 his contention that the assessment of his performance in his 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 his 2014 staff report. He noted that the report should be deemed final and placed on his personal file, together with a copy of the Committee's opinion.

2. Substantively, the Appraisals Committee noted, in its opinion, that during the conciliation meeting, the complainant confirmed that he did not object to the markings or performance-related comments in his staff report, for which he received an overall rating of "very good". Before the Tribunal, he neither contests that statement nor proffers submissions contesting the substance of his 2014 staff report. In fact, his report was very positive, and his reporting and countersigning officers very highly commended his work during the subject period. The complainant states that he has no reason to object to the markings of his good staff report, but states that he contested it "due to the lack of fundamental and most basic employment documentation in his personal file which would for instance have given an official, proper, factual and in particular a fair basis for the reporting and countersigning officer[s] to draw up the staff report".

3. The EPO submits that the complaint is irreceivable because the complainant lacks a cause of action as he has not alleged an adverse effect stemming from the staff report and has failed to demonstrate an actual injury which would allow him to succeed on the merits. In

consideration 8 of Judgment 3739, the Tribunal confirmed its case law which states that, for there to be a cause of action, a complainant must demonstrate that the contested administrative action caused injury to her or his health, finances or otherwise or that it is liable to cause injury. The complainant does not demonstrate that the result of that reporting exercise, which he does not contest, has caused any injury to his health, financially or otherwise, or that it is liable to cause him injury. Accordingly, the complaint is irreceivable and will be dismissed and it is therefore unnecessary to consider the complainant's request for the disclosure of documents.

Moreover, the complainant's administrative status, which is the focus of his objection, is *res judicata* since it has been the subject of a number of internal appeals and complaints he has filed with the Tribunal, some of which have resulted in judgments (see Judgments 4642 and 4640).

4. As to the EPO's counterclaim for costs, the Tribunal is satisfied that a review of the complainant's pleadings alone reflects a case that obviously had no possibility of success and is frivolous (see Judgment 4025, consideration 11). Accordingly, the Tribunal will order that the complainant pay the EPO the nominal amount of 100 euros in costs within sixty days of the date of the public delivery of this judgment.

#### DECISION

For the above reasons,

1. The complaint is dismissed.
2. The complainant shall pay the EPO costs in the amount of 100 euros within sixty days of the date of the public delivery of this judgment.

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