

E. (No. 8)

v.

EPO

136th Session

Judgment No. 4721

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Ms M. E. against the European Patent Organisation (EPO) on 21 January 2017 and corrected on 5 March, the EPO's reply of 4 July 2017, the complainant's rejoinder of 17 October 2017 and the EPO's surrejoinder of 29 January 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 appraisal report for 2015.

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 embodied in Circular No. 366, entitled "General Guidelines on Performance Management". 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. At the material time, she was working as an examiner within Directorate 1504. As from 1 April 2015, she was transferred to Directorate 1507 following the closure of the Berlin Office.

On 26 May 2015, the complainant formally objected to the production and quality objectives set by her reporting officer for 2015 raising "objectively justified reasons to suspect partiality". Her objectives were upheld by the countersigning officer on the same day. On 8 March 2016, she requested the replacement of her reporting and countersigning officers because she suspected their partiality for reasons which had already been brought forward in the context of previous reporting exercises, that is 2012, 2013 and 2014.

On 9 March 2016, during the prior interview with her reporting officer, the complainant requested to have two separate reports for the reporting exercise 2015: one for the period 1 January to 31 March 2015 and another for the period 1 April – date on which she had been transferred – to 31 December 2015. On 29 March 2016, she received the appraisal report covering the second period with an overall assessment of her performance as "corresponding to the level required for the function". Disagreeing with it, she submitted comments reiterating her suspicions of bias, arguing that she had still not received a report for the first period of 2015 and contesting the productivity objectives set. Meanwhile, on 11 April 2016, her request for replacement of the reporting and countersigning officers had been rejected on the basis that she did not submit "sufficient grounds to shed any doubts on the [reporting and countersigning officers'] neutrality".

A conciliation meeting took place on 2 May 2016, following which the appraisal report was maintained. On 26 May, the complainant raised an objection with the Appraisals Committee requesting the quashing of her report and the issuance of a new report by impartial officers "with at least all negative comments deleted". She also sought compensation for the moral injury allegedly suffered.

In its opinion of 22 July 2016, the Appraisals Committee recommended that the complainant's objection be rejected and her appraisal report for 2015, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter dated 27 September 2016, the complainant was informed that the Vice-President of Directorate-General 4 (DG4) had decided to follow those recommendations. That is the impugned decision.

In her complaint, the complainant asks the Tribunal to set aside the impugned decision and to declare that the Appraisals Committee's opinion and her 2015 appraisal report are null and void. She further requests that the allegedly flawed report be removed from her personal file and that a new report be drawn up and signed by impartial officers, with all negative comments deleted. She also seeks compensation for the moral and financial injuries allegedly suffered, an award of costs and payment of 8 per cent compound interest on all amounts due.

The EPO notes that the complainant attempts to broaden the scope of the dispute by focusing on the disagreements between her and her line managers since 2012 rather than on the appraisal report itself. It argues that the complainant's request that all negative comments be deleted from her appraisal report amounts to an injunction which is outside the Tribunal's jurisdiction. As to the claim regarding financial compensation, it contends that the complainant is not allowed to file claims about a separate and distinct decision. The EPO requests the Tribunal to dismiss the complaint as partly irreceivable and unfounded. Should it decide to set aside the appraisal report, the Organisation considers that such ruling would be deemed to afford sufficient redress to the complainant.

CONSIDERATIONS

1. In the decision contained in a letter of 27 September 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, not even arguments, to substantiate her contention that the assessment of her

performance in her appraisal report for the period 1 April (when she was transferred to Directorate 1507) to 31 December 2015 was arbitrary or discriminatory. The Vice-President also accepted the Appraisals Committee's recommendations to reject the complainant's objection and to confirm her 2015 appraisal report. He therefore deemed the report final and informed the complainant that it would be placed on her personal file, together with a copy of the Committee's opinion.

2. In the complaint form, the complainant lists a number of claims, which the Tribunal states as follows: (1) to quash the impugned decision in its entirety *ab initio*; (2) to declare the opinion of the Appraisals Committee null and void; (3) to declare the appraisal report for the period 1 April to 31 December 2015 arbitrary and discriminatory; (4) to quash the appraisal report for the period 1 April to 31 December 2015 *ab initio* and to order that that report, the opinion of the Appraisals Committee and the impugned decision be removed from her personal file; (5) to order that a new appraisal report for the period 1 April to 31 December 2015 be drawn up and signed by impartial officers, with all negative comments deleted; (6) to grant her compensation for moral and financial damages caused by the appraisal report in the amount of 40,000 euros, in view of the long lasting and recurring attacks on her personal dignity and professional integrity and the continued denial and delay of justice; (7) to grant her an additional amount of 1,000 euros per month until a new appraisal report is drawn up; (8) to order that she be reimbursed her legal costs for bringing the complaint to the Tribunal; (9) to grant her compound interest of 8 per cent per annum on all amounts due. Additionally, the complainant requests that the Tribunal conducts an oral hearing pursuant to Article 12, paragraph 1, of its Rules.

3. Since the provisions applicable to this complaint are the same as those cited in Judgment 4718, 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.

4. The complainant's request for oral proceedings is rejected as 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.

5. The EPO and the complainant seek the joinder of this complaint with the complainant's fifth complaint in which she challenges her 2014 staff report. The Tribunal notes that the complainant's claims to declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal in her fifth complaint are not made in the present complaint. Noting also that, in this complaint, the complainant claims damages that are not requested in her fifth complaint, the claim to join these complaints is rejected.

6. Citing "reasons of procedural economy and legal certainty", the complainant seeks the joinder of this complaint with four other complaints she has filed with the Tribunal. She states that her second and third complaints relate to undue interferences with the responsibilities of the examining Divisions of which she had been a member, by illegitimately invoking Article 10 of the European Patent Convention; that her fourth complaint relates to her right to impartial reporting and countersigning officers for the reporting period 1 January 2012 to 31 August 2012 and that her seventh complaint relates to the decision to close the Berlin Office, taken by the very same officers that were involved in the undue interferences underlying her second and third complaints. The Tribunal rejects the application to join those four complaints with the present complaint as they clearly do not raise the same or even similar issues of fact and law.

7. The complainant's request that the Appraisals Committee's opinion dated 22 July 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).

8. As the complainant purports to challenge the impugned decision on procedural and substantive grounds, the Tribunal recalls 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.”

9. The EPO submits that the complainant’s claim for financial damages is also irreceivable to the extent that she seeks to justify it on the basis that her 2015 appraisal report had a “great negative impact on her career opportunities”. In the EPO’s view, this is a separate claim for lack of promotion or step advancement in 2016, which, under the Tribunal’s case law, would be irreceivable as an impermissible extension of the scope of this complaint in which the complainant centrally challenges her 2015 appraisal report. 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 2016. The complainant’s claim is receivable but unfounded.

10. The EPO further submits, without explicitly raising irreceivability as a threshold issue, that the complainant's focus on the disagreements between her and her management since 2012, rather than on the report itself, is an attempt to broaden the scope of the complaint. The EPO states that the complainant thereby suggests that she does not intend to challenge her 2015 appraisal report itself but intends to embark upon a broader discussion regarding her ongoing disagreements with her management since 2012 on which she cannot depend to prove that her 2015 appraisal report was unlawfully established. It is however clear that the complainant relies on the disagreements with the EPO's management, including with her reporting and countersigning officers over the subject period, to support her case that her 2015 appraisal report was procedurally and substantively tainted because of circumstances which raises in her views suspicion of partiality or bias by the officers who established that report.

11. It is noteworthy that the complainant's submissions to support her pleas of bias and partiality are essentially the same which she proffered in her fifth complaint. The Tribunal therefore finds, as it did in consideration 12 of its Judgment 4713 on that complaint (citing Judgments 4543, consideration 8, and 3380, consideration 9) that 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, has not discharged that burden. Her pleas of bias and partiality on the part of her reporting and countersigning officers allegedly vitiating her 2015 appraisal report are therefore unfounded.

12. The complainant's further submissions that there were flaws in the conciliation and objection procedures are also unfounded as the Tribunal has rejected similar arguments which were proffered against the background of the same legal framework in similar circumstances in Judgment 4637, considerations 11 to 14, and in Judgment 4713, on the complainant's fifth complaint, consideration 9. Additionally, the complainant's submission, in effect, that her 2015 appraisal report was unlawfully established because the Appraisals Committee's opinion was

unsubstantiated is unfounded as the Tribunal finds that the Committee fairly substantiated its opinion within the terms of its mandate to determine whether the report was arbitrary or discriminatory. Moreover, the complainant has failed to prove that the establishment of her 2015 appraisal report or the process of the subsequent procedures are vitiated by the breach of the applicable rules, as she alleges.

13. As the complainant is unable to provide persuasive proof of circumstances falling within the scope of the Tribunal's limited power of review, the Tribunal finds no fault with her 2015 appraisal report in the circumstances of this case. The Tribunal agrees with the Appraisals Committee that the complainant has not provided any evidence proving that her appraisal report was flawed. The Vice-President of DG4 therefore correctly accepted this conclusion in the impugned decision.

14. In the foregoing premises, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 16 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