V. (No. 2)

v.

EPO

136th Session **Judgment No. 4724**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M. V. against the European Patent Organisation (EPO) on 22 December 2016, the EPO's reply of 7 April 2017, the complainant's rejoinder of 25 July 2017 and the EPO's surrejoinder of 17 November 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 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 1998 working as an examiner and a 50 per cent staff representative at the material time. At the beginning of the reporting period for 2015, several objectives were established regarding the assessment of her performance. In a note dated 31 March 2015, she contested the fixed objectives, "even if prima facie they look[ed] reasonable", on the main ground that she could not agree with "so precise objectives that shift[ed] all uncertainties on [her], while [she had been] deprived of any flexibility to reach the targets imposed on [her]".

In her appraisal report for the period covering 1 January to 31 December 2015, the complainant's overall performance was assessed as "corresponding to the level required for the function". Disagreeing with the content and some of the markings contained in her report, on 21 April 2016, the complainant requested that a conciliation procedure be initiated.

A meeting took place on 19 May 2016, following which the report was confirmed with some amendments concerning the wording. On 6 June, she raised an objection with the Appraisals Committee arguing, among other things, that, in spite of all the difficult circumstances flowing from her "double role" of examiner and staff representative, she managed to reach the agreed production and, thus, her performance deserved an overall rating of "significantly higher than the level required for the function". Contending that her appraisal report was not drawn up in good faith, she also alleged institutional harassment.

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.

The complainant asks the Tribunal to order the amendment of her appraisal report for 2015 so that she receives an overall marking of "significantly higher than the level required for the function", to declare

decision CA/D 10/14, Article 110a of the Service Regulations, Circular No. 366 and the EPO's specific guidelines on performance assessment – namely, the "New PAX Guidelines 2.2", the "Guidance to Performance Assessment of Examiners in [Directorate-General 1 (DG1)]", the "Guidelines for Individual Quality Objective Setting" and the "Functional Competencies for Examiners", which were all published on 22 December 2014 – illegal and to repeal Circulars Nos. 355 and 356 insofar as impacting her right to have a fair and objective appraisal report, and a fair and impartial conflict resolution procedure. She further requests that the disagreement on her report be assessed by a true, impartial, quasi-judicial body not only on grounds of "discrimination" and "arbitrariness". She also seeks the award of "real" and "(aggravated) moral damages", as well as costs.

The EPO argues that the complainant's request that her appraisal report be amended is irreceivable as the Tribunal does not have jurisdiction to issue injunctions. Concerning the complainant's request for a new assessment by a quasi-judicial body, it contends that such claim amounts to an order to the Organisation to amend its rules, which does not fall within the Tribunal's jurisdiction. As to the claims on the alleged illegality of decision CA/D 10/14, Article 110a of the Service Regulations and Circulars Nos. 355, 356 and 366, it contends that the complainant may only request that the aspects of a general decision giving rise to an individual implementation be set aside. Finally, it notes that, by seeking compensation for "real" damages, the complainant intends to request compensation for loss of career advancement, that is her non-promotion for 2016, which is a separate and distinct decision. The EPO requests that the complaint be dismissed as partly irreceivable and unfounded. Should the Tribunal decide to set aside the appraisal report, it considers that such ruling would be deemed to afford sufficient redress to the complainant.

CONSIDERATIONS

1. The complainant challenges her appraisal report for the period 1 January to 31 December 2015, which was established under the new performance appraisal rules that took effect from 1 January 2015. 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.

2. It is convenient for the Tribunal to recall 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."

3. The complainant's submission that her appraisal report was substantively flawed because it was established in breach of the EPO's own rules, namely Section A(3) of Circular No. 365 (entitled "General

Guidelines on the EPO Competency Framework" and entered into force on 1 January 2015), is well founded. This provision, which relevantly states that, in assessing competency levels, "[a]ll relevant competencies are to be taken into account [...] core and functional competencies for all staff", imposes a duty on the repository of the power to take into account both core and functional competencies in staff assessments. A similar construction is applicable also to Section B(1), which relevantly states that "[t]he first assessment of competencies of individual staff members (based on the generic profiles) shall take place in parallel to the first mid-term review of the 2015 appraisal cycle". As a result, the impugned decision and the complainant's 2015 appraisal report will be set aside and the EPO will be ordered to remove the report from her personal file.

4. In the normal course of events, the matter would be remitted to the EPO ordering that the complainant's 2015 appraisal report be redone. However, it will be impracticable to issue such an order given the effluxion of time. As the complainant provides no evidence of actual injury and of a causal link between the unlawful establishment of her 2015 appraisal report and the injury she suffered to justify an award of "real" damages, they will not be awarded. As she has not articulated the injury which the breach has caused her, no "(aggravated) moral damages" [as she articulates her claim] will be awarded. However, as she prevails in her claim to set aside the impugned decision and her 2015 appraisal report, she is entitled to costs for which she will be awarded 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision dated 27 September 2016, as well as the complainant's 2015 appraisal report, are set aside.

2. The EPO shall remove the appraisal report from the complainant's personal file.

3. The EPO shall pay the complainant costs in the amount of 1,000 euros.

4. All other claims are dismissed.

In witness of this judgment, adopted on 17 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