

**d. I. T. (No. 22)**

**v.**

**EPO**

**137th Session**

**Judgment No. 4788**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-second complaint filed by Mr D. d. I. T. against the European Patent Organisation (EPO) on 5 March 2018, the EPO's reply of 3 July 2018, the complainant's rejoinder of 3 December 2018, corrected on 21 January 2019, and the EPO's surrejoinder of 9 May 2019;

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Having examined the written submissions and decided not to hold oral proceedings, since the complainant has withdrawn his request;

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

The complainant challenges his appraisal report for 2016.

Facts relevant to this case can be found in Judgment 4718, delivered in public on 7 July 2023, concerning the complainant's twenty-first complaint. Suffice it to recall that the complainant has been a permanent employee of the European Patent Office, the EPO's secretariat, since 2002. At the material time, he was working as an examiner, but was released from his official duties on a 50 per cent basis for staff representation activities.

On 29 April 2016, the complainant formally objected to the objectives set for him for 2016, arguing that they had strongly increased compared to the previous years. The objectives were upheld by the countersigning officer on 2 May.

During the intermediate review meeting held on 6 July 2016, the complainant was informed by his reporting officer that his productivity had improved but remained below the objectives and that it “should improve in the second half” of the reporting year, failing which the overall performance marking would be negative. In his appraisal report for the period covering 1 January 2016 to 31 December 2016, his overall performance was assessed as “acceptable, with some areas of improvement, which [had] been addressed with [him]”. As the complainant disagreed with the assessment of his performance, a conciliation meeting took place on 21 March 2017, following which the assessment of two competencies was changed from “basic” to “intermediate” but the overall performance rating was upheld.

On 24 March, the complainant raised an objection with the Appraisals Committee requesting that the overall marking of his performance be assessed as “corresponding to the level required for the function”, that the abovementioned competencies be upgraded from “intermediate” to “advanced”, and that some of the comments contained in his report be corrected or deleted. He further sought that his objection be examined by an Appraisals Committee constituted according to the requirements of impartiality and balanced composition of the Tribunal’s Judgments 3694 and 3785, that he be given the opportunity to answer to any argument put forward by the Administration and that he be heard in oral proceedings. Finally, in the event that the Appraisals Committee did not grant these last three requests, he asked that his case be referred to the Internal Appeals Committee.

In its opinion of 11 October 2017, the Appraisals Committee concluded that there was no evidence that the assessment of the complainant’s performance and his appraisal report had been discriminatory or arbitrary. It nevertheless recommended, with a view to promoting continuous dialogue on performance, that the appraisal report be referred back to the reporting and countersigning officers in

order for them to review some of the wording contained in it. By a letter dated 8 December 2017, the complainant was informed that the Vice-President of Directorate-General 4 had decided to follow those recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as his 2016 appraisal report. On a subsidiary basis, he requests that his case be remitted to the EPO in order that a new appraisal report may be prepared by impartial officers and reviewed by an independent and impartial organ having a balanced composition, which organ should give him an oral hearing. He claims moral damages in the amount of 5,000 euros and 1,500 euros in costs.

The EPO requests the Tribunal to dismiss the complaint as unfounded in its entirety.

#### CONSIDERATIONS

1. Since the provisions applicable to this complaint are the same as those cited in Judgment 4786, 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. Citing reasons of “procedural economy, and work efficiency”, the complainant seeks the joinder of this complaint with four other complaints he has filed with the Tribunal. His request to join this complaint with his twenty-first complaint, in which he challenged his 2015 appraisal report, is moot as the latter complaint was the subject of Judgment 4718, delivered in public on 7 July 2023. The complainant’s request for the joinder of this complaint with those in which he challenged the new career system which was introduced on 1 January 2015 by decision CA/D 10/14 and Circulars Nos. 364 (concerning the implementation of the career system) and 366 (entitled “General Guidelines on Performance Management”), is also moot as those complaints were the subject of Judgment 4255, delivered in public on 10 February 2020. His last request to join this complaint with his

twenty-third complaint, in which he challenged his 2017 appraisal report, is rejected as the latter is not concerned with the appraisal of his 2016 performance and does not raise the same issues of fact and law.

3. In challenging the impugned decision and his 2016 appraisal report on procedural and substantive grounds, the complainant asks the Tribunal to:

- (1) quash the impugned decision;
- (2) quash his 2016 appraisal report;
- (3) quash the overall performance rating he received in his report (that is, “acceptable, with some areas of improvement, which [had] been addressed with [him]”);
- (4) change his overall performance rating to at least “corresponding to the level required for the function”;
- (5) remove certain negative comments from his report;
- (6) quash the evaluation of the functional and core competencies;
- (7) upgrade the evaluation of those competencies to “advanced”;
- (8) award him moral damages; and
- (9) award him costs.

Subsidiarily, the complainant requests the Tribunal to remit the case to the EPO for it to issue a new appraisal report prepared by impartial officers and reviewed by an independent and impartial organ having a balanced composition, rather than by the Appraisals Committee, which organ should give him an oral hearing.

4. The complainant’s request for the orders stated in items (4), (5) and (7) are rejected as, in the main, they involve an impermissible determination by the Tribunal of what the appraisal should be. The Tribunal recalls its case law, stated, for example, in consideration 13 of Judgment 4637, referring to Judgment 4257, that its power to review appraisal reports is limited to considering, among other things, whether there was illegality in drawing up the contested report. It is not within the Tribunal’s power to change the overall assessment rating or to

upgrade the evaluation of the functional and core competencies in an appraisal report (see also Judgments 4720, consideration 4, 4719, consideration 7, and 4718, consideration 7). The Tribunal may, if necessary, set aside the contested appraisal report at the same time as the impugned decision and remit the matter to the EPO for review.

5. The Tribunal notes that the complainant has withdrawn his request for a hearing pursuant to Article 12, paragraph 1, of the Tribunal's Rules, making it unnecessary to consider that request in the present judgment.

6. In his complaint brief, the complainant asserts the receivability of his complaint, and, mirroring an aspect of his challenge to the merits of his 2016 appraisal report, states that the overall performance rating he was given was unsatisfactory and that it contained a series of negative comments. He subsequently states, under the heading “[u]ndue characterization as underperformer”, that the negative assessment of his performance was not based on an objective assessment of his work, but upon a plan to progressively worsen the assessment of the work of permanent employees with a hidden purpose to improve the finances of the EPO “while precipitating the retirement or dismissal of older employees, like [him]” to reduce its overall salaries and unit costs and its financial liabilities. He makes this statement against the background of submissions that decisions CA/D 10/14 and CA/D 7/17 (amending some provisions of the Service Regulations for permanent employees of the European Patent Office with effect from 1 July 2017) and their attendant regulation, were, in effect, a ruse to increase the required productivity of examiners to levels that would lead them to be characterized as incompetent and, ultimately, be dismissed because negative appraisal reports would follow. He concludes that such “wrong motivations” also renders his 2016 appraisal report unlawful.

In his rejoinder, under the heading “[r]eceivability” and the subheading “[r]elationship with the provisions of Article 52 [of the Service Regulations, which deals with professional incompetence] adopted by [decision] CA/D 7/17”, the complainant underlines that successive appraisal reports are the basis for the application of

Article 52 of the Service Regulations, as adopted by decision CA/D 7/17 and that, in view of the programme of short-term objectives and reports started in 2018, he believes that his 2016 appraisal report is one of the several instruments chosen by the EPO to constructively dismiss him. He concludes that, directly derived from the EPO's unlawful attempt to "engineer" his constructive dismissal, he is suffering damages of different consideration, for which he seeks compensation. To the extent that this is a claim for damages for constructive dismissal, which the complainant presents for the first time in his rejoinder, it is irreceivable, as the EPO submits, citing consideration 10 of Judgment 4092.

7. As the complainant challenges the impugned decision on procedural and substantive grounds, the Tribunal recalls the following statement which it made in Judgment 4564, considerations 2 and 3, concerning the limited power of review that it exercises in the matter of staff appraisals:

"2. [...] It is not for the Tribunal, whose role is not to supplant the administrative authorities of an international organisation, to conduct an assessment of an employee's merits instead of the competent reporting officer or the various supervisors and appeals bodies which may be called upon to revise that assessment. [...]"

3. [...] [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."

8. The complainant challenges his 2016 appraisal report on two procedural grounds. He submits that the appraisal review process established under the new system, which became effective on 1 January 2015 and under which his 2016 appraisal was conducted, was irregular because of the unbalanced composition of the Appraisals Committee.

He argues, in particular that, under that system, the members of the Committee are not independent and impartial, and that it does not provide for a hearing, thus breaching his right to be heard. He also submits that the general framework for performance assessment established by decision CA/D 10/14 and Circulars Nos. 364 and 366 are flawed leading to the diminishment of his legal status and the breach of his acquired rights and legitimate expectations. These submissions and arguments are unfounded. In addition to the fact that Circular No. 364 contains no provisions pursuant to which his 2016 appraisal was conducted, in consideration 11 of Judgment 4718, the Tribunal rejected essentially similar arguments, which the complainant therein proffered, against the background of the same legal framework in similar circumstances. The Tribunal therefore rejects the complainant's request to remit the case to the EPO for his 2016 appraisal report to be reviewed by an independent and impartial organ having a balanced composition. The Tribunal also rejects the complainant's request to remit the case to the EPO for it to issue a new 2016 appraisal report prepared by impartial officers. He provides no evidence to meet the burden which he bears to prove partiality on the part of his reporting and countersigning officers.

9. The second procedural ground, in which the complainant contends, in effect, that his 2016 appraisal report was flawed because the general decisions underlying its establishment were adopted without consultation with the General Advisory Committee (GAC) and the General Consultative Committee (GCC) is also unfounded. In considerations 8 and 9 of Judgment 4718, the Tribunal rejected essentially similar arguments which the complainant proffered against the background of the same legal framework in similar circumstances.

10. Before the Appraisals Committee, the complainant stated disagreement with the overall performance rating he received in his 2016 appraisal report on essentially the same bases he proffers in this complaint. The Committee recalled that Article 110a(4) of the Service Regulations limited the scope to its mandate to determine whether the appraisal report was arbitrary or discriminatory. The Committee noted that, during the conciliation meeting, "[t]he objective, measurable and

other elements being considered for the assessment” were duly explained to the complainant and that there were no indications that those elements were arbitrary or discriminatory and that the objectives were arbitrarily set. The Committee considered and commented upon the assessed results as reported by the complainant’s reporting officer before it, including that the complainant’s productivity level for the 2016 appraisal period was 0.15, which was significantly below the value of 0.21 set for examiners; that the number of his intermediate actions was in the average range; that his number of classified documents was low, as was the number of his chairman activities; that the complainant’s lack of productivity and production clearly justified the overall performance rating he received; but that, in any event, the weighting of each aspect of performance lied within the reporting officer’s discretion. The Tribunal considers that these comments by the reporting officer are not inconsistent with the comments made in the complainant’s appraisal report. The Committee stated that, lastly, as explained to the complainant, activities as staff representative did not fall within the scope of the performance assessment exercise. The Tribunal observes that this statement is supported by the case law in consideration 15 of Judgment 4718. The Committee concluded that the complainant provided no evidence or arguments to prove that the assessment was arbitrary or discriminatory.

11. The Tribunal finds no merit in the complainant’s submissions in this complaint to move it, based upon its power of review, stated in consideration 7 of this judgment, to quash the impugned decision and the appraisal report or to issue the related orders he seeks. For example, there is no evidence to support the complainant’s allegations that his objectives for the 2016 period were arbitrarily set, that his reporting officer was motivated by bias in the assessment of his performance or that the report breached the principle of equal treatment. The complainant’s submission that his work was not objectively assessed, implicitly invites the Tribunal into the realm of technical considerations that are not within its purview. Additionally, contrary to his submission, the overall performance rating of “acceptable, with some areas of improvement, which [had] been addressed with [him]” was substantiated by his



reporting and countersigning officers. His reliance upon his submissions referred to in consideration 6 of this judgment is misplaced as they are based on mere speculation premised in part on decision CA/D 7/17 and Article 52 of the Service Regulations, which were not in effect when his 2016 appraisal was conducted, and upon Circular No. 364 which contains no provision for establishing a performance appraisal report. There is no evidence that any reliance was placed upon these provisions to establish the complainant's 2016 appraisal report.

12. The complainant provides no convincing proof of circumstances falling within the scope of the Tribunal's limited power of review. The Tribunal agrees with the Appraisals Committee that he has not provided any evidence or arguments proving that his appraisal report was arbitrary or discriminatory. The Vice-President of Directorate-General 4 therefore correctly accepted this conclusion in the impugned decision.

13. 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 3 November 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

CLÉMENT GASCON

MIRKA DREGER