

E. (No. 9)

v.

EPO

137th Session

Judgment No. 4791

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Ms M. E. against the European Patent Organisation (EPO) on 12 March 2018 and corrected on 23 May, the EPO's reply of 7 September 2018, the complainant's rejoinder of 21 January 2019, corrected on 1 February, and the EPO's surrejoinder of 2 May 2019;

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 2016.

Facts relevant to this case can be found in Judgments 4713 and 4721, delivered in public on 7 July 2023, concerning the complainant's fifth and eighth complaints, respectively. Suffice it to recall that the complainant has been a permanent employee of the European Patent Office, the EPO's secretariat, since 2003. As from 1 April 2015, she was transferred from Directorate 1504 to Directorate 1507 following the closure of the Berlin Office.

On 18 May 2016, the complainant formally objected to the objectives set by her reporting officer for 2016, arguing that his approach was arbitrary and that there were "objectively justified reasons" to suspect

him of partiality. Her objectives were upheld by the countersigning officer on 23 May.

During the intermediate review meeting held on 13 July 2016, the complainant was informed by her reporting officer that her productivity was below the objectives set and could lead to her overall performance being assessed as “acceptable” or lower.

Following an interview held on 14 February 2017, the complainant received her appraisal report for the period from 1 January 2016 to 31 December 2016, in which her overall performance was assessed as “acceptable, with some areas of improvement, which [had] been addressed with [her]”. Disagreeing with the content and the markings contained in her report, the complainant requested that a conciliation procedure be initiated. On 24 April 2017, she requested to be assisted by a staff representative during the conciliation meeting. The countersigning officer replied on the same day that she was expected to attend the meeting alone “as in other years”.

A conciliation meeting took place on 25 April, following which the report was confirmed. On 23 May 2017, 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. She also sought compensation for the moral injury allegedly suffered in the amount of 1,000 euros per month until a new report for 2016 was drawn up.

In its opinion of 11 October 2017, the Appraisals Committee recommended that the complainant’s objection be rejected and that her appraisal report for 2016, which in its view was neither arbitrary nor discriminatory, be confirmed. More specifically, it noted that the complainant’s allegation of bias against the reporting and countersigning officers was unsubstantiated and that the setting of her objectives was reasonable. The Committee nevertheless recommended, with a view to promoting continuous dialogue on performance, to refer the appraisal report back to the reporting and countersigning officers in order for them to review some of the wording in the Section “Overall assessment”. By a letter dated 8 December 2017, the complainant was informed that the Vice-President of Directorate-General 4 (DG4) had decided to accept those conclusions and recommendations. That is the

impugned decision, following which a reviewed appraisal report was issued.

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 2016 appraisal report are null and void. She further requests that the allegedly flawed report, the Appraisals Committee's opinion and the impugned decision be removed from her personal file. She seeks compensation for the moral and financial injuries allegedly suffered, in the amount of 40,000 euros, plus 1,000 euros per month until all relevant documents are removed from her file, an award of costs and interest on all amounts due. In the alternative, she further requests that the whole appraisal procedure be declared null and void, that her case be remitted to the EPO so that a new report may be drawn up and signed by impartial officers and with a duly composed Appraisals Committee or Internal Appeals Committee as the Tribunal sees fit, that she be awarded 2,000 euros in damages "for the procedural delay [and] the involved procedural violations", and that she be paid 2,000 euros in costs.

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 also considers that her procedural strategy consists in having the Tribunal adjudicating upon the status of examiners, which is beyond its competence because the European Patent Convention, on which the complainant relies in her complaint, does not form part of her rights and terms of appointment. 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.

CONSIDERATIONS

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

- (1) set aside the impugned decision in its entirety *ab initio*;
- (2) declare that the Appraisals Committee's opinion is null and void;
- (3) declare that her 2016 appraisal report is null and void;
- (4) remove the appraisal report, the Appraisals Committee's opinion and the impugned decision from her personal file;
- (5) grant her, in view of the long lasting and recurring attacks on her personal dignity and professional integrity and the continued denial and delay of justice, compensation in the amount of 40,000 euros for moral and financial damages;
- (6) grant her an additional amount of 1,000 euros per month until all relevant documents are removed from her personal file;
- (7) grant her costs, which amount is to be specified at the end of the procedure;
- (8) grant her compound interest of 8 per cent per annum on all amounts due; and
- (9) grant her a hearing pursuant to Article 12, paragraph 1, of the Tribunal's Rules.

In the alternative, she requests the Tribunal to:

- (a) set aside the impugned decision in its entirety *ab initio*;
- (b) declare that the Appraisals Committee's opinion is null and void;
- (c) declare that the whole appraisal procedure is null and void, including the appraisal report;
- (d) refer the case back to the EPO for the drawing up of a new report by impartial officers and with a duly composed Appraisals Committee or Internal Appeals Committee, as the Tribunal sees fit;
- (e) grant her 2,000 euros in compensation "for the procedural delay [and] the involved procedural violations";
- (f) grant her 2,000 euros in costs; and
- (g) grant her compound interest of 8 per cent per annum on all amounts due.

2. The complainant's application for the joinder of this complaint with other complaints she has filed with the Tribunal, including her fifth and eighth complaints in which she challenged her 2014 and 2015 staff and appraisal reports, respectively, is rejected as they do not raise the same or even similar issues of fact and law. Concerning more particularly her fifth and eighth complaints, they were the subject of Judgments 4713 and 4721 respectively, delivered in public on 7 July 2023, so that her request for joinder with these two complaints is moot.

3. The complainant's requests in items (2) and (b) to declare the Appraisals Committee's opinion null and void are 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 causing injury which may be impugned before the Tribunal (see, for example, Judgments 4721, consideration 7, and 4637, consideration 5).

4. The complainant's requests in item (3) to declare her 2016 appraisal report null and void, and in item (c) to declare the whole appraisal procedure null and void, including the appraisal report, are noted. The Tribunal simply observes that it may, if appropriate, 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 complainant's request in item (9) for oral proceedings is rejected as the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to permit it to make an informed decision on the case. For the same reasons, her request that the EPO provides "all statistical data" to start "an in-depth discussion on her performance" is also rejected. Moreover, this request is an impermissible fishing expedition.

6. The complainant's request in item (5) is irreceivable as it is an impermissible attempt to extend the scope of her complaint, which is centrally concerned with her challenge to the establishment of her

2016 appraisal report, and not with matters for which she seeks compensation in that item.

7. 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.

8. 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.”

9. Procedurally, the complainant submits that there were flaws in the conciliation and objection procedures as, according to her, the system enshrined in Circular No. 366 is arbitrary and discriminatory. The submissions the complainant proffers to support her challenge to the establishment of her 2016 appraisal report on these procedural grounds are similar, if not identical, to those she proffered against the background of the same legal framework in similar circumstances in her

fifth and eighth complaints, which were the subject of Judgments 4713 and 4721 respectively. The Tribunal therefore finds, as it did in Judgments 4713, consideration 9, and 4721, consideration 12, that those submissions should be rejected as unfounded.

10. Regarding the merits, in her objection with the Appraisals Committee, the complainant asserted that her 2016 performance should have been assessed at an overall performance rating better than the one she was given. She repeated her objection to her reporting and countersigning officers on the basis that she suspected their partiality for “objectively justified reasons”. In its opinion, which the Vice-President of Directorate-General 4 (DG4) endorsed in the impugned decision, the Appraisals Committee noted the complainant’s objection to the establishment of her 2016 appraisal report on this ground. The Committee concluded that it found no reasons that justified or substantiated the allegations of partiality. The complainant repeats her allegations of impartiality against her reporting and countersigning officers in this complaint. However, as the Tribunal is satisfied that the Appraisals Committee’s conclusion was open to it, the complainant’s submission that her 2016 appraisal report should be set aside on the basis of partiality is unfounded.

Moreover, 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 and eighth complaints. The Tribunal therefore finds, as it did in Judgments 4713, consideration 12, and 4721, consideration 11, on those complaints (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 2016 appraisal report are therefore unfounded.

11. In her objection with the Appraisals Committee, the complainant also questioned the productivity objectives that were set for the 2016 appraisal period, as well as their assessment by her reporting and

countersigning officers. The Committee concluded that it appeared that all of the relevant factors (that is, the complainant's experience as a staff member at her grade and the fact that she was moving to a new field) were duly taken into consideration in setting the objectives for the 2016 period. It also noted that the objectives had been set in the lower range for an examiner of her experience and that there was no discrimination as to the methods by which her performance was assessed, which were the same applied uniformly for all examiners with the same quantitative and non-quantitative elements. The Committee further stated that it seemed that the reporting and countersigning officers had correctly assessed her performance as "acceptable, with some areas of improvement, which [had] been addressed with [her]", taking into account that her production and productivity were below the level expected of her grade; that she only reached the production objectives because she did not take planned leave; that, although her final output was achieved, the planned productivity was not achieved (as the appraisal report shows); and that examples of lax attitude were explained to her during the conciliation meeting.

12. The complainant submits that the Appraisals Committee erred because it did not itself analyse the statistically relevant factors on which her 2016 appraisal report was established, which, she argues, should have been carefully analysed by the Committee before it concluded that the assessment had not been arbitrary or discriminatory. The Tribunal however determines that the Committee, which in its opinion noted the discretion which a reporting officer enjoys in conducting an assessment (see, for example, the case law mentioned in consideration 8 above), fairly acted within its mandate, under Article 110a(4) of the Service Regulations for permanent employees of the European Patent Office, when it concluded that the complainant had, in effect, not proved that the report was arbitrary or discriminatory. The complainant's arguments which suggest that the Appraisals Committee's opinion should be set aside because it was silent on her allegations about her exposure to threats during the conciliation procedure are rejected as there is no evidence that any alleged threats were proffered. So too is her submission which suggests that the Committee's opinion should be

set aside because it did not grant her request for a hearing. There is no authority that she was entitled to such a hearing in the Committee's procedure. The complainant's submission that the Committee's opinion was unsubstantiated is also rejected. The Tribunal is satisfied that the Committee fairly substantiated its opinion within its mandate under Article 110a(4) of the Service Regulations.

13. 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 she has not provided any evidence or arguments proving that her appraisal report was arbitrary or discriminatory. 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 6 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