

J. (No. 10)

v.

EPO

139th Session

Judgment No. 4976

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr P. J. against the European Patent Organisation (EPO) on 1 June 2019 and corrected on 30 July 2019, and the EPO's reply of 18 November 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, 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 2010-2011.

At material times, the regulatory framework within the EPO for creating and reviewing staff reports was embodied in Circular No. 246, entitled "General Guidelines on Reporting". If a staff member was not in agreement with the content of her or his report, Section D facilitated a conciliation procedure between her or him and her or his reporting and countersigning officers, under the direction of a mediator appointed by the President of the European Patent Office, the EPO's secretariat. If no agreement was reached at the end of the mediation procedure, Section D(7) permitted the staff member to pursue the matter before the Internal Appeals Committee in accordance with Articles 107 and 108 of the Service Regulations for permanent employees of the Office.

The complainant is a permanent employee of the Office since 1990.

Following a prior interview with his reporting officer held on 11 April 2012, the complainant received his staff report for the period from 1 January 2010 to 31 December 2011, signed by the reporting and countersigning officers on 24 and 25 April 2012 respectively. His quality and attitude to work and dealings with others were rated as “very good”, whereas his productivity, aptitude and his overall performance were assessed as “good”.

On 16 May 2012, a meeting took place between the complainant and his reporting officer in which the staff report was discussed. On 3 August 2012, the complainant expressed his disagreement with the markings given in his report, which “seem[ed] to be somewhat different than the impression [he] ha[d] about [his] performance [and led] to a feeling of a lack of recognition”. On 28 August, the reporting officer submitted his final comments in which he alleged that the markings given were, from his point of view, correct. The countersigning officer approved these final comments on the following day.

On 26 September 2012, the complainant requested the application of the conciliation procedure set out in Section D of Circular No. 246.

A conciliation meeting took place on 13 June 2013, but no agreement could be reached. The mediator drew up a report on 9 July 2013 and sent it to the Vice-President of Directorate-General 2 (DG2) for a decision.

On 17 July 2013, the Vice-President of DG2 decided that the report would remain unchanged. The complainant signed it on 31 July. On 10 October 2013, he lodged an internal appeal requesting that the ratings given for his productivity, aptitude and his overall performance be modified to “very good”. His appeal was forwarded to the Appeals Committee.

In its opinion of 20 January 2016, the Appeals Committee’s majority recommended rejecting the appeal as unfounded. By a letter dated 15 March 2016, the complainant was informed that the President of the Office had decided to follow this recommendation. This was the impugned decision in the complainant’s fourth complaint, which was dismissed in Judgment 4256, delivered in public on 10 February 2020.

Following the public delivery of Judgments 3694 and 3785 on 6 July and 30 November 2016 respectively, in cases that did not involve the complainant but in which the Tribunal had found the Appeals Committee to be improperly composed at the time of its opinion of 20 January 2016, the President withdrew his decision of 15 March 2016 and referred the complainant's internal appeal back to a newly constituted Committee.

On 12 December 2017, the Secretariat of the Appeals Committee informed the complainant that his remitted appeal would be considered based on the file as it then stood and that the parties could submit further comments provided that new relevant facts had occurred. On 2 January 2018, the complainant objected to the President's decision to remit the case to the Appeals Committee and announced that, should the Organisation reopen his case internally, he would seek exemplary damages for undue delay.

After a fresh examination of the appeal and having heard the parties, the Appeals Committee issued its opinion on 18 December 2018. It unanimously recommended that the appeal be rejected as unfounded. With regard to the compensation for moral damages on account of the length of the procedure, the majority of the Committee recommended that 400 euros be awarded to the complainant, whereas the minority recommended an award of 1,400 euros. Regarding the complainant's objection of 2 January 2018, the Committee unanimously noted that the President's initial decision of 15 March 2016 was flawed and had been withdrawn so that the appeal be referred for a new assessment by a newly composed Appeals Committee. By a letter dated 15 February 2019, the complainant was informed that the President had decided to reject his appeal as unfounded and to award him a total amount of 500 euros for the length of the procedure. That is the impugned decision in the present proceedings.

The complainant asks the Tribunal to find that the markings given in his staff report for 2010-2011 "are not a proper reflection of [his] performance for the [reporting period] in question". He also seeks the award of 10,000 euros in moral damages, including for undue delay, and costs for the internal appeal procedure and the present proceedings.

The EPO argues that the complainant's claim aiming at finding that his staff report did not reflect his performance is irreceivable as the Tribunal cannot substitute its own opinion for the competent bodies' assessment of the qualities, performance and conduct of the person concerned. It also raises doubts as to the complainant's cause of action since the staff report conveys a favourable assessment of his performance and he does not allege any adverse effect arising from this favourable evaluation. Finally, the EPO argues that there is a duplication of proceedings with the fourth complaint. Consequently, it requests the Tribunal to dismiss the complaint as partially irreceivable and as unfounded in its entirety.

CONSIDERATIONS

1. This complaint is the culmination of the complainant's challenge to his staff report for the period from 1 January 2010 to 31 December 2011, which ultimately led to the decision, dated 15 February 2019, which he impugns. In that decision, the Vice-President of Directorate-General 4 (DG4) informed the complainant that the President of the Office had decided to reject his internal appeal as unfounded but to award him 500 euros for the length of the procedure. In challenging this decision, the complainant centrally contends, in effect, that the President wrongly accepted the Appeals Committee's unanimous recommendation to reject his appeal, rather than find, in line with his contention, that the markings he was awarded in the contested staff report for productivity and attitude to work and dealings with others, as well as for the overall performance, should have been revised from "good" to "very good". He asks the Tribunal to find that those markings and the overall performance rating given in the contested staff report "are not a proper reflection of [his] performance" for the period of assessment.

2. As the complainant challenges the impugned decision on procedural and substantive grounds, the Tribunal refers to its consistent case law which it recalls in consideration 2 of Judgment 4977, also delivered in public this day.

3. The complainant requests the Tribunal to join this complaint with his fourth complaint, which the Tribunal has already considered in Judgment 4256, delivered in public on 10 February 2020. The facts reveal that, in his fourth complaint, the complainant had challenged the decision of 15 March 2016 which informed him that the President had decided to accept the recommendation of the majority of the Appeals Committee of 20 January 2016 to reject his internal appeal in which he had contested the merits of the staff report for 2010-2011. Subsequently, the Tribunal decided in Judgments 3694 and 3785 that the Appeals Committee that heard a number of internal appeals (including that underlying the complainant's fourth complaint) was unlawfully constituted. The President therefore withdrew the decisions which were based upon the recommendations of the unlawfully constituted Appeals Committee and reconstituted it. In considerations 7 and 8 of Judgment 4256, the Tribunal stated that the withdrawal of those final decisions on account of the unlawful composition of the Committee and the related action of referring the cases to a newly constituted Appeals Committee were rational steps lawfully taken by the President in light of Judgments 3694 and 3785. It thereupon concluded that the withdrawn final decisions (including that underlying the complainant's fourth complaint) were now without object as the legal foundation for the complaints impugning those decisions no longer existed. The Tribunal therefore dismissed them. The complainant's application to join this complaint with his fourth complaint is therefore moot.

The complainant's request to join this complaint with "other pending claims relating to [his] annual assessments" is also rejected as he has failed to identify the complaints which he wishes to have joint with this complaint.

4. The complainant's apparent challenge to the lawfulness of the reconstituted Appeals Committee that heard his internal appeal underlying the present complaint, as well as his submission that the procedure before the reconstituted Appeals Committee is redundant, are unfounded.

5. Regarding the alleged substantive flaws in the contested staff report, the complainant's contention to the effect that the overall performance marking which he received lacks proper basis as it does not correspond to his performance for the period of assessment is based on the complainant's subjective view of his performance for that period rather than upon any discernible unlawfulness within the Tribunal's limited power of review. It is accordingly unfounded.

6. It is notable, as the EPO points out, that the contested report conveys a favourable assessment of the complainant's performance. Moreover, he does not allege any adverse effect arising from this favourable evaluation nor does he allege that the positive markings he received have caused or are liable to cause him any injury. In fact, the complainant fails to prove that the markings and the overall performance rating he was awarded in the contested staff report were in breach of a proper procedure and did not benefit from a thorough assessment. The Tribunal is satisfied, as is obvious from the Appeals Committee's conclusion, which was accepted in the impugned decision, that the complainant's reporting and countersigning officers fairly substantiated the markings and the overall performance rating they awarded to him in the report. It follows that the complainant's claim for 5,000 euros for the "wrongful report" and the "wrong marking and abusive procedural conduct by the [EPO] and the stress this has caused [him]" is also unfounded.

7. Regarding the complainant's claim for compensation for the inordinate delay in the internal appeal procedure, the Tribunal notes that, following the recommendations of the Appeals Committee, the EPO has already paid the sum of 500 euros to him for this. As the complainant has not put forward any argument to justify the award of the additional amount he seeks under this head, the claim is rejected.

8. As the complainant has not prevailed either in the internal appeal procedure or in this complaint, there is no basis for awarding him the costs he seeks. Indeed, this is a case where there is an argument of substance that the complainant should pay the EPO's costs because

his complaint was vexatious. However, the EPO has not sought to make this an issue and it need not be pursued any further.

9. In the foregoing premises, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER