

E. (No. 9)

v.

EPO

139th Session

Judgment No. 4977

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Ms B. E. against the European Patent Organisation (EPO) on 18 January 2019, the EPO's reply of 2 May 2019, the complainant's rejoinder of 7 June 2019 and the EPO's surrejoinder of 11 September 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 her staff report for 2012-2013.

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 joined the Office in 1987 as an examiner. With effect from 1 September 2007, she was promoted to grade A4(2). At relevant times, she worked in Directorate 1456. As from 1 January 2014, she was transferred to Directorate 1464. She retired on 1 August 2018.

On 17 September 2012, following two intermediate review meetings held on 26 June 2012 and 31 July 2012, the reporting officer issued a notification letter, entitled “Formal warning under Circular No. 246”, informing the complainant that her performance for the ongoing reporting period did not meet the expectations since her “production and productivity figures” were “very low” and did not significantly improve between the two meetings. The complainant was thus advised that her performance was likely to be evaluated with a marking of “less than good” under productivity. The reporting officer further invited her to disclose any exceptional circumstance that could justify the shortcomings in her performance and emphasised that he was available to discuss supportive measures to assist her in achieving her objectives.

On 21 September 2012, the complainant challenged the reporting officer’s authority to appraise her and, hence, to issue the notification letter. She referred to Article 3(3) of the Service Regulations and to Administrative Council decision CA/D 8/02, dealing with classification, and argued that the reporting officer was not her immediate superior within the meaning of Circular No. 246 as, according to her interpretation of the applicable provisions, her grade, A4(2), and his grade, A5, were on the same hierarchical level. On 26 September, the Human Resources Line Management Support invited her to a meeting with the reporting officer, the Human Resources Department and the Employment Law Directorate to discuss the criticisms she had against the reporting officer. The following day, she reiterated her objections against her reporting officer and requested an explanation on the purpose of the invitation. The Human Resources Line Management Support answered that the purpose of the meeting was “to provide a (legal) response to [her] statements, in a dialogue”. She then asked that a “reasoned counter-statement based on relevant passages of valid legal provisions” be communicated to her in writing before any meeting could take place.

On 11 October 2012, the complainant was invited again for a meeting. Simultaneously, the Vice-President of Directorate-General 4 (DG4) and the countersigning officer confirmed to the complainant that her reporting officer was vested with full authority to assess her performance and to draw up the staff report.

On 4 February 2013, the complainant filed an allegation of harassment against her reporting officer. The Investigative Unit initiated an investigation and issued its report on 29 August 2013 in which it concluded that the allegations “regarding harassment and misconduct” were unfounded.

Pursuant to Section B(4) of Circular No. 246, the reporting officer invited the complainant to a prior interview on four occasions, which she repeatedly refused to attend. On 31 July 2014, the reporting and countersigning officers signed her staff report for the period from 1 January 2012 to 31 December 2013. Her quality, aptitude and attitude to work and dealings with others were rated as “good”, and so was the overall rating, whereas her productivity was rated as “less than good”.

On 4 August 2014, the complainant disagreed with the staff report, indicating that the drop in productivity figures was “solely caused by the provable multiple disruptive interference” of the reporting officer and arguing that the latter was not entitled to assess her performance. On 28 August, she requested the application of the conciliation procedure set out in Section D of Circular No. 246.

No conciliation meeting took place. The complainant handed her written comments to the mediator on 30 September 2015 and the reporting and countersigning officers presented their arguments in a videoconference on 10 December 2015. No agreement could be reached. The mediator drew up a report on 11 December 2015 and sent it to the Vice-President of Directorate-General 1 (DG1) for a decision.

The final staff report was endorsed without amendment by the Vice-President of DG1 on 8 February 2016. The complainant signed it on 17 February. On 30 March 2016, she lodged an internal appeal, which was forwarded to the Appeals Committee.

Upon request from the complainant, the internal appeal procedure was dealt with in writing. On 29 October 2019, the Appeals Committee issued its opinion in which it unanimously recommended rejecting the appeal as unfounded in its entirety.

By a letter dated 19 December 2018, the complainant was informed that the President of the Office had decided to follow the Appeals Committee's recommendation to reject her appeal. That is the impugned decision.

The complainant asks the Tribunal to order the issuance of a new staff report for 2012-2013 which would be "free of abuse of discretion". She also seeks the award of moral damages, in an amount of 50,000 euros, plus 20,000 euros for the length of the internal appeal procedure, and 3,000 euros in costs.

The EPO argues that the complainant's cause of action lapsed when she retired on 1 August 2018 and hence requests that the complaint be dismissed as irreceivable and, subsidiarily, as unfounded.

CONSIDERATIONS

1. This complaint is the culmination of the complainant's challenge to her staff report for the period from 1 January 2012 to 31 December 2013 that ultimately led to the decision, dated 19 December 2018, which she impugns. She states that the present complaint is directed against that decision along with the underlying opinion of the Appeals Committee, which unanimously recommended to the President of the Office to reject her internal appeal against the contested staff report. In that report, she was awarded the markings of "less than good" for productivity and "good" for quality, aptitude and attitude to work and dealings with others, as well as for the overall performance rating. The Appeals Committee also recommended rejecting the complainant's ancillary claims for moral damages and costs. In challenging the impugned decision on procedural and substantive grounds, the complainant asks the Tribunal to order the issuance of a new staff report for 2012-2013 "free of abuse of discretion", to award her 50,000 euros in moral damages for the alleged

“adversity” she has suffered because of her reporting officer’s vexatious behaviour towards her, as well as 20,000 euros in moral damages for the length of the internal appeal procedure, and costs in the amount of 3,000 euros.

2. As the complainant challenges the impugned decision on procedural and substantive grounds, the Tribunal recalls its consistent case law according to which the power of review that it exercises in the matter of staff appraisals is a limited one. 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. The assessment 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. The Tribunal 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 (see, for example, Judgment 4564, consideration 3). The Tribunal has also stated that this limitation on its power of review in such cases naturally applies to both the rating given in a staff report and the comments accompanying the rating (see, for example, Judgments 4720, consideration 11, 4564, consideration 3, 3945, consideration 7, and 3228, consideration 3). The Tribunal has stated as well, in consideration 6 of Judgment 1136, that, within the scope of the reporting officer’s wide discretion, it is to be presumed that the assessment of a staff member’s performance is made in good faith and in the interest of both the staff and the organisation.

3. The Tribunal rejects the complainant's request for an order that the EPO issues a new staff report for 2012-2013 "free of abuse of discretion". The Tribunal may, if appropriate, set aside the contested staff report at the same time as the impugned decision and remit the matter to the EPO for review but not on the basis suggested.

4. The EPO submits that, inasmuch as the complainant retired on 1 August 2018 and is no longer an active employee of the Organisation, she no longer has a cause of action to challenge her staff report. The main claim by which she seeks to obtain a new staff report for 2012-2013 has lost its practical relevance and thus has become moot. The EPO insists that, assuming that the complainant would be awarded more favourable markings than the one she received, it would have no impact on her career advancement. This submission is unfounded by reference to the statement the Tribunal made in consideration 7 of Judgment 4637. Therein, the Tribunal rejected a similar submission stating that a staff member who had retired from the service of the EPO had, at the very least, "a moral interest in challenging a report appraising her or his performance" and that the fact that the complainant has retired since the report was drawn up does not, in itself, deprive her or him of a cause of action. Whether this concept of "moral interest" accords with the Tribunal's Statute is a matter that need not be explored in these proceedings (see Judgment 4893, consideration 3).

5. As in her internal appeal, the complainant, who at the material time held grade A4(2), submits, in effect, that the contested staff report was procedurally flawed because her reporting officer, who held grade A5, was not vested with the authority to evaluate her performance. She cites as authority Article 3 of Administrative Council decision CA/D 8/02, which amended, among other things, the salary scales to permit a restructuring of the career system for staff in category A, which relevantly stated that "[g]rades A5 and A4(2) are both regarded as immediately above grade A4 for the purposes of the [Service] Regulations [for permanent employees of the Office]". The submission is unfounded by reference to considerations 3 and 4 of Judgment 4892 in which the Tribunal rejected essentially the same

submission the complainant proffered in her challenge to her staff report for another period of assessment.

6. Repeating the arguments she advanced before the Appeals Committee (which mirrors her comments to her assessment in the contested staff report) the complainant contends, in effect, that her reporting officer lacked the necessary objectivity to appraise her. Her arguments supporting this contention may be summarized as follows: her reporting officer had constantly exposed her to “completely unjustified disruptive interference into [and obstruction of her] work” (even already in 2014 and after she had left Directorate 1456), as well as attacks on her dignity. These caused her to lose a considerable amount of time and “[a] possible drop in [her] productivity” reflected in the reduction in the markings to “good”. The fact that her reporting and countersigning officers failed to provide any observation on her comments means, in her view, that they either accepted it or did not wish to do so, in clear indifference or disrespect. Furthermore, the decision by the Vice-President of Directorate-General 1 (DG1) to confirm the contested staff report without addressing her comments shows that that decision was not made upon due consideration of all of her arguments. Notably, these arguments are essentially the same to support a similar contention which the complainant had made in her second complaint. In consideration 6 of Judgment 4892 on that complaint, the Tribunal rejected those arguments and the contention as unfounded. Consequently, the Tribunal rejects them in this complaint. Moreover, based on the record, the Tribunal determines that it was open to the Appeals Committee to conclude, as it did, in effect, on the complainant’s internal appeal, that she had provided insufficient evidence to cast any doubt upon the objectivity of the reporting officer in establishing the contested staff report.

7. The Tribunal also rejects the complainant’s submission that the Appeals Committee’s opinion, which the President accepted in the impugned decision, was flawed. The complainant’s submission to the effect that the Committee did not carry out its review of the contested report properly and deliberately distorted, misrepresented and

misinterpreted the rules, the facts and the evidence she provided, is not borne out in the Committee's opinion. The record confirms that the complainant provided no grounds on which the Committee could have concluded that the contested staff report was flawed either procedurally or substantially. 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 her in the contested staff report.

8. The preceding reasons entail a detailed and comprehensive consideration of all arguments advanced by the complainant. It cannot be assumed that in the future reasons of this character will be given and that the matter will not be dealt with in a much more summary way.

9. As the complainant has failed to demonstrate that the decision she impugns in this complaint is in any respect unlawful, this complaint, as well as her ancillary claims for moral damages and costs, will be dismissed.

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