

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

E. (No. 8)

v.

EPO

139th Session

Judgment No. 4981

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Ms B. E. against the European Patent Organisation (EPO) on 23 July 2018, the EPO's reply of 17 December 2018, the complainant's rejoinder of 16 January 2019 and the EPO's surrejoinder of 26 April 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 appraisal report for 2017.

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". This 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 joined the European Patent Office, the EPO's secretariat, in 1987. At the material time, she was working as an examiner at grade A4(2), step 11, and belonged to the job group 4. She was also released from her official duties on a 50 per cent basis for staff representation activities. She retired on 1 August 2018.

Following an intermediate review meeting held on 5 July 2017 with her reporting officer, the complainant received her appraisal report for the period covering 1 January 2017 to 31 December 2017. Her overall performance was assessed as "corresponding to the level required for the function". As she disagreed with the assessment of her performance, a conciliation meeting took place on 7 May 2018, following which the report was confirmed. She then raised an objection with the Appraisals Committee which was asked to consider the case on 17 May 2018. In her objection, she argued that the relevant provisions of Circular No. 366 required taking the grade of the staff member reported upon into account for the performance assessment and that, since she "d[id] not hold a grade/step", her appraisal report contravened the applicable rules and was arbitrary. The complainant implicitly referred to the fact that, when the new career system had been introduced by decision CA/D 10/14, some employees holding grade A4(2) were not transposed into one of the 17 grades of the new salary scale (grades G1 to G13) but retained *ad personam* the basic salary corresponding to their grade on 31 December 2014, which would be subject to future adjustments in application of the salary adjustment method. This was the case for the complainant.

In its opinion of 13 June 2018, the Appraisals Committee concluded that Circular No. 366 applied to all staff members, notably examiners, regardless of their grade, and including those who were graded A4(2) at the time of the introduction of the new career system. It recommended that the complainant's objection be rejected and that her appraisal report for 2017, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter dated 19 July 2018, 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 set aside the impugned decision and to order the issuance of a new “flawless” 2017 appraisal report. She also seeks an award of moral damages, in the amount of 100,000 euros, as well as costs.

The EPO notes that the complainant fails to discuss the appraisal of her performance, which conveys a favourable assessment, although she did not achieve her productivity objectives. It contends that the complainant misused the objection procedure against her report as a “palliative to the internal appeal” she failed to lodge against the letter of 30 April 2015 notifying her that she would not be transposed into the new salary scale. It emphasises that her grade *ad personam* and her report are two separate and distinct subject matters. Moreover, it argues that the complainant’s cause of action lapsed when she retired on 1 August 2018. For these reasons, the EPO requests the Tribunal to dismiss the complaint as irreceivable and, on a subsidiary basis, as unfounded in its entirety.

CONSIDERATIONS

1. The Tribunal rejects the complainant’s request for an order that the EPO issues a new “flawless” appraisal report for 2017. In the main, such request involves an impermissible determination by the Tribunal of what the appraisal should be. The Tribunal may however, 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.

2. 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 appraisal report. The main claim by which she seeks to obtain a new report for 2017 has lost its practical relevance and thus has become moot. The EPO insists that, assuming that the complainant would be awarded a more favourable overall performance marking 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 had retired since the report was drawn up did not, in itself, deprive her or him of a cause of action. The EPO's objection to receivability must therefore be dismissed.

3. In the Tribunal's view, the complainant fittingly replied to the EPO's contention that she misused the objection procedure against her report as a "palliative to the internal appeal" she failed to lodge against the letter of 30 April 2015 notifying her that she would not be transposed into the new salary scale, by stating, in effect, that the subject of this complaint is that the contested appraisal report does not meet the applicable rules and the 30 April 2015 letter was not a challengeable decision.

4. The complainant states that this complaint is directed against the final decision, communicated to her in the letter of the Vice-President of Directorate-General 4 (DG4), dated 19 July 2018 (along with the Appraisals Committee's opinion of 13 June 2018), to reject her objection to her 2017 appraisal report.

5. At the material time, the regulatory framework for appraisal reports for the 2017 period was provided in Circular No. 366, which took effect from 1 January 2015. It contains, among other things, a conciliation procedure set out in Section B(11) and a detailed objection procedure before an Appraisals Committee, set out in Sections B(12) and B(13). If a staff member is not in agreement with the content of her or his report, Section B(11) facilitates a conciliation meeting, planned by the countersigning officer, with the staff member and the reporting officer in order to reach agreement. Section B(12) permits a staff member who is still dissatisfied with her or his appraisal report after the conciliation procedure, and wishes to pursue the matter, to request that the matter be taken further by raising an objection with the Appraisals Committee within ten working days.

6. Section B(13) of Circular No. 366 contains, among other things, a provision which requires the Appraisals Committee to examine an objection raised by a staff member by reviewing whether the appraisal report was arbitrary or discriminatory. It also provides for the Appraisals Committee's assessment to be submitted to the competent authority for a final decision on the objection; for that final decision to be forwarded to the staff member, the reporting officer and the countersigning officer, together with the assessment of the Appraisals Committee; and for the filing of the decision which confirms the report (thereby deemed final) in the staff member's personal file.

When Circular No. 366 took effect, the Administrative Council issued decision CA/D 10/14, which introduced a new career system for the EPO. It redesigned notably the classification of jobs and grades, the conditions of step advancement, the promotion procedure and the performance management system. Article 37 of decision CA/D 10/14 amended Article 109(3) of the Service Regulations for permanent employees of the European Patent Office to exclude appraisal reports from the review procedure as had been the previous position. Article 39 of decision CA/D 10/14 inserted Article 110a into the Service Regulations, under the heading "Objection procedure for appraisal reports". Article 110a(1) stated that, in case of disagreement on an appraisal report, the parties to the dispute shall endeavour to settle it through conciliation. Article 110a(2) stated that an employee who is dissatisfied with her or his appraisal report at the outcome of the conciliation may challenge it by raising an objection with the Appraisals Committee. Article 110a(4) stated that the Appraisals Committee "shall review whether the appraisal report was arbitrary or discriminatory". Article 110a(5) stated that the competent authority shall take a final decision on the objection, having due regard to the assessment of the Appraisals Committee. Article 38 of decision CA/D 10/14 amended Article 110(2) of the Service Regulations to exclude appraisal reports from the internal appeal procedure before the Internal Appeals Committee.

7. As the complainant challenges the impugned decision and her 2017 appraisal report, 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.

8. In its opinion, the Appraisals Committee noted that the complainant's appraisal report for the period covering 1 January 2017 to 31 December 2017 had not been finalized because she wished to pursue the objection procedure first. It noted, further, that it had been requested to consider the case after no agreement was reached in the conciliation meeting between the complainant and her reporting and

countersigning officers on 7 May 2018. The Committee also noted that the complainant was awarded an overall performance rating of “corresponding to the level required for the function” for the subject period. It also noted that the complainant proffered only one ground for her objection to the performance assessment, which objection it set out as follows:

“[The complainant] claims that Circular No. 366 requires in Section B(3) that objectives to be set at the individual level must take into account the grade of the staff member and in section B(6) that the appraisal report concludes with a general assessment that compares the level of individual performance with the level normally expected for the staff member’s grade. Since she does not hold a grade/step, the said provisions could not be met and she could not have any agreed objectives. For this reason [she] considered the report completely arbitrary.”

9. The Appraisals Committee recalled that, pursuant to Article 110a(4) of the Service Regulations, the scope of its power to review appraisal reports was limited to determine whether the report was arbitrary or discriminatory. It also recalled, among other things, in a measure, the general principles recalled in consideration 7 of this judgment. It stated, in effect, that the complainant, like other staff members who were at grade A4(2) when the new career system entered into force (on 1 January 2015), remained at the top of her job group, was bound by the same rules as all other staff members and there was no ground to believe that those rules were applied in a different manner to her than to other staff members. The Committee concluded that the complainant did not submit any evidence or argument to substantiate that the assessment of her performance was discriminatory or arbitrary and rejected her objection to her 2017 appraisal report.

10. The complainant’s submission that the impugned decision is unlawful because it accepted the Appraisals Committee’s opinion in which the Committee “misdefin[ed]” the scope of its power to review appraisal reports is unfounded. Although the Committee referred to the general principles concerning the power to review appraisal reports in terms recalled in consideration 7 of this judgment, it clearly carried out its review of the contested report properly and fairly substantiated its

opinion within its mandate under Article 110a(4) of the Service Regulations, concluding that “no evidence or arguments ha[d] been provided to substantiate that the assessment [was] discriminatory or arbitrary”. It thereupon rejected the complainant’s objection to her 2017 appraisal report as unfounded.

11. The complainant’s submissions that her 2017 appraisal report was arbitrary and flawed because her grade did not exist in the new career system and that, since she did not hold a grade, the assessment criteria of Circular No. 366 did not apply to her so that the Appraisals Committee’s opinion is flawed insofar as it stated that Circular No. 366 applied to all staff members, and that the Committee’s “ill-founded” opinion caused her undue injury, are unfounded. Notably, in considerations 6, 7 and 8 of Judgment 4786, the Tribunal considered essentially similar submissions and determined that they were unsustainable and accordingly unfounded.

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 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.

13. 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. The lawfulness of the prevailing legal framework, at the relevant time, for the making and reviewing of performance appraisals in the EPO has been established (see Judgment 4637, considerations 11 to 14). The very limited grounds for impeaching the making of a performance appraisal or its review have been identified (see Judgment 4564, considerations 2 and 3).

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 24 October 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