

B. (No. 12)

v.

EPO

139th Session

Judgment No. 4982

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 20 December 2018, the EPO's reply of 26 April 2019, the complainant's rejoinder of 5 June 2019 and the EPO's surrejoinder of 16 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 his appraisal report for 2017.

Facts relevant to this case can be found in Judgment 4723, delivered in public on 7 July 2023, concerning the complainant's sixth complaint. Suffice it to recall that the complainant has been a permanent employee of the European Patent Office, the EPO's secretariat, since 1990. At the material time, he was working as an examiner at grade G13, but was released from his official duties on a 50 per cent basis for staff representation activities.

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.

On 20 December 2017, the President of the Office adopted the Guidelines on performance development, which entered into force on 1 January 2018, and superseded any earlier circular relating to performance management (including notably Circular No. 366) and any other instruction and/or guidance on that same matter. The decision indicated that, for the 2017 performance assessment, Circular No. 366 would continue to apply up to the phase of the completion of the appraisal report and submission to the staff member.

At the beginning of the reporting period for 2017, several objectives were established regarding the assessment of the complainant’s performance. On 5 and 10 April 2017, he contested those objectives arguing, among other things, that they had been increased by 10 per cent compared to the previous year. The countersigning officer confirmed them on 16 May 2017.

In his appraisal report for the period covering 1 January 2017 to 31 December 2017, the complainant’s overall performance was assessed as “corresponding to the level required for the function”. In his comments, the reporting officer made a note in which he indicated that the productivity result was “acceptable” but pointed out that the complainant “should realise that [his] result [was] normally below that what [could] be accepted from an experienced examiner in grade G13, having worked for a long time in his field”. Disagreeing with this note and the overall marking contained in his report, the complainant requested that a conciliation procedure be initiated on 5 April 2018.

On 14 May 2018, having observed that no conciliation meeting had been held within the time limit provided for in the Guidelines on performance development, he raised an objection with the Appraisals Committee. In the reply he received on 25 May, he was informed that a conciliation meeting would take place on 29 May, that his objection against the report was therefore not registered but that he would be

given the possibility to raise it anew within two weeks of receipt of the conciliation report.

A conciliation meeting eventually took place on 29 May, following which the appraisal report was confirmed. On 4 June 2018, the complainant raised again his objection with the Appraisals Committee.

In its opinion of 20 June, the Appraisals Committee recommended that the complainant's objection be rejected and that his appraisal report for 2017, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter dated 6 September 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 amendment of his appraisal report for 2017 so that he receives an overall marking of "above the level required for the function" and the note of the reporting officer on his productivity result be deleted. He also requests the Tribunal to declare decision CA/D 10/14, Article 110a of the Service Regulations for permanent employees of the Office, Circular No. 366 and the specific guidelines on performance assessment – namely, the "New PAX Guidelines 2.2", the "Guidance to Performance Assessment of Examiners in [Directorate-General 1 (DG1)]", the "Guidelines for Individual Quality Objective Setting" and the "Functional Competencies for Examiners", which were all published on 22 December 2014 – illegal and to repeal Circulars Nos. 355 and 356 insofar as impacting his right to have a fair and objective appraisal report, and a fair and impartial conflict resolution procedure. He further requests that the disagreement on his report be assessed by a true, impartial, quasi-judicial body not only on grounds of "discrimination" and "arbitrariness". He also seeks the award of "real" and "(aggravated) moral damages", as well as costs.

The EPO contends that, concerning the claims on the alleged illegality of decision CA/D 10/14, Article 110a of the Service Regulations and Circulars Nos. 355, 356 and 366, the complainant may only request that the aspects of these general decisions giving rise to an individual implementation be set aside. It also notes that the specific guidelines on

performance assessment constitute managerial tools which do not adversely affect the complainant. Finally, it argues that the claim for “real” damages is irreceivable insofar as the complainant intends to request compensation for loss of career advancement, which is a separate and distinct decision. The EPO requests that the complaint be dismissed as partly irreceivable and unfounded.

CONSIDERATIONS

1. The complainant impugns the decision of 6 September 2018 taken by the Vice-President of Directorate-General 4 (DG4), which accepted the Appraisals Committee’s recommendations to reject the complainant’s objection and to confirm his 2017 appraisal report. Since the provisions applicable to this complaint are the same as those cited in Judgment 4981, also delivered in public this day, the Tribunal refers to considerations 5 and 6 of that judgment which contain those provisions, making it unnecessary to reproduce them in the present judgment.

2. In challenging the impugned decision and his 2017 appraisal report on procedural and substantive grounds, the complainant asks the Tribunal to:

- (1) set aside the impugned decision, dated 6 September 2018, which confirmed his 2017 appraisal report; and
- (2) amend his 2017 appraisal report so that he receives an overall performance marking of “above the level required for the function” and delete the reporting officer’s note on his productivity result.

In respect of procedure, he requests the Tribunal to:

- (3) declare that decision CA/D 10/14, Article 110a of the Service Regulations for permanent employees of the European Patent Office and Circular No. 366 are illegal;
- (4) declare that the four specific Directorate-General 1 (DG1) guidelines on performance assessment published in December 2014 (namely, the “New PAX Guidelines 2.2”, the “Guidance to

Performance Assessment of Examiners in DG1”, the “Guidelines for Individual Quality Objective Setting” and the “Functional Competencies for Examiners”) are illegal insofar as they impact his right to have a fair, objective and lawful assessment;

- (5) repeal Circulars Nos. 355 and 356 insofar as they impact his right to have a fair and objective appraisal report and a fair and impartial conflict resolution procedure;
- (6) order that the disagreement on his appraisal report be assessed by a true, impartial, quasi-judicial body; and
- (7) order that all grounds for invalidating a discretionary decision (concerning the evaluation of his performance) be assessed not only on the basis that the assessment was arbitrary or discriminatory.

In respect of damages and costs, he asks the Tribunal to:

- (8) award him any “real” damages caused by the impugned decision;
- (9) award him “(aggravated) moral damages” in an amount of no less than 1,000 euros, in particular for the EPO’s willful application of the new (defective) law; and
- (10) award him costs.

3. The complainant’s request in item (2) to order that his 2017 appraisal report be amended so that he receives an overall performance rating of “above the level required for the function” instead of “corresponding to the level required for the function” must be rejected as the Tribunal is not competent to issue orders of this kind. In the main, this request involves 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 Judgments 4564 and 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 its power to change the overall assessment rating or to upgrade the evaluation of the competencies in an appraisal report (see, for example, Judgments 4788, consideration 4, 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.

4. The complainant's claims in items (3) and (4) for orders declaring decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal, as well as the four specific guidelines on performance assessment which the EPO published in December 2014, are rejected. The Tribunal reiterates its statements in consideration 6 of Judgment 4718 that, inasmuch as decision CA/D 10/14, Circular No. 366 and Article 110a of the Service Regulations introduced amendments to the rules for staff appraisals with effect from 1 January 2015, they can be challenged in these proceedings only to the extent that their provisions were applied in a manner prejudicial to the complainant and thus affected the establishment of the contested appraisal report. Additionally, inasmuch as the complainant centrally challenges his 2017 appraisal report, he can only request setting aside those aspects of these general decisions which had any bearing on the establishment and the content of his report. Regarding the guidelines, the Tribunal notes that they are unrelated to the establishment of the complainant's appraisal report.

5. The complainant's request in item (5) challenging Circulars Nos. 355 and 356 is also irreceivable as the subject matter of these circulars was unrelated to the establishment of the appraisal report.

6. The EPO submits that the complainant's claim for "real" damages is unsubstantiated and is also irreceivable to the extent that he intends to request compensation for loss of career advancement. In the EPO's view, this is a claim for lack of promotion or step advancement, which is a separate and distinct decision, and, in effect, an impermissible extension of the scope of this complaint in which the complainant centrally challenges his 2017 appraisal report. The Tribunal agrees with the Organisation based on its previous judgments (see, for example, Judgments 4794, consideration 15, 4790, consideration 5, and 4726, consideration 7).

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.”

(See also Judgment 4786, consideration 4.)

8. The submissions the complainant proffers to support his challenge to the establishment of his 2017 appraisal report on procedural grounds are essentially the same which other complainants proffered against the background of the same legal framework in similar circumstances and which were all rejected by the Tribunal in previous judgments (see, for example, Judgments 4788, consideration 8, 4718, consideration 11, 4713, consideration 9, and 4637, considerations 11 to 14). The Tribunal also rejects them as unfounded in this complaint.

9. Regarding the merits, in his objection with the Appraisals Committee, the complainant argued that his 2017 performance should have been assessed at an overall rating of “above the level required for the function”. He submitted that his “core competencies” had not been assessed but arbitrarily set by the management without any proper

substantiation, and that no “specific guidelines” about the “core competencies” had ever been published, much less submitted to the mandatory consultation process. He also argued that the 2017 objectives assigned to him were no proper substitute for general notions and the yardstick to assess staff performance were not disclosed to him. He further contended that he was working 50 per cent of his time as a staff representative during the year 2017, but the EPO did not take into account the special circumstances that arose due to his function as staff representative. In conclusion, he submitted that the overall performance rating of “corresponding to the level required for the function” was unsubstantiated, lacked a proper basis and did not correspond to his performance, and that it was awarded in breach of proper procedure and without the benefit of a thorough and complete assessment which rendered it arbitrary.

10. Having noted the complainant’s submissions, the Appraisals Committee concluded that no evidence nor arguments had been provided to substantiate that the assessment had been arbitrary or discriminatory. Therefore, it recommended rejecting the objection as unfounded. The Tribunal is satisfied that the Committee sufficiently substantiated its opinion within the scope of its mandate.

11. The complainant’s submissions in this complaint mirror those he made in his objection with the Appraisals Committee, particularly concerning the setting of his objectives and the assessment of his competencies.

The Committee’s rejection of his submission that his objectives were not properly set is borne out by the record. For example, the Committee noted that, whereas the objectives, which were set by the reporting officer and confirmed by the countersigning officer, required the complainant to conduct 45 searches and 15 final actions in 85 days, he only achieved 38 searches and 10 final actions in 90 days. In particular, the Committee noted that the objectives set were taking into account the fact that the complainant was released on a 50 per cent basis from his official duties in order to carry out his duties as staff

representative (during the first half of 2017). The Committee concluded that the objectives were therefore set accordingly.

The Committee also referred to the note made by the reporting officer that the complainant's productivity result was "normally below that what [could] be accepted from an experienced examiner in grade G13, having worked for a long time in his field" and explained that the note was maintained due to the fact that the staff member was expected to perform at the level of G13 after his reintegration from his staff representative duties. The Committee concluded that the note was of an explanatory nature and could not be considered as a threat.

In sum, the Tribunal finds that the complainant's "core competencies" had been correctly assessed and that the reporting and countersigning officers' comments in the complainant's 2017 appraisal report, including the abovementioned note, were balanced, fair and fell within their discretionary power.

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 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 in its entirety.

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