

D. (No. 2)

v.

EPO

139th Session

Judgment No. 4983

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr E. R. I. D. against the European Patent Organisation (EPO) on 5 November 2018, the EPO's reply of 25 February 2019, the complainant's rejoinder of 2 April 2019 and the EPO's surrejoinder of 22 July 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.

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 1996 as an examiner. At the material time, he was working in Directorate 1879 and held grade G12, step 5.

On 20 June 2017, during the intermediate review meeting for the reporting period 2017, the complainant was informed by his reporting officer that he had only achieved 31 per cent of the set yearly productivity objectives. An improvement plan was established to allow the complainant to meet those objectives for the second half of the year. A second review meeting was held on 10 October 2017.

Following the prior interview held on 12 February 2018, the complainant received his appraisal report for the period covering 1 January 2017 to 31 December 2017. In the report, the reporting officer noted that the complainant had partially achieved his productivity objectives but pointed out that “[his] effort to devise a strategy and catch up [his planned objectives] after the review meeting in May [*recte* June]” was noteworthy. On 26 March 2018, the countersigning officer indicated that, despite the complainant’s respectable efforts, particularly in the second half of the year, his end-results were still “disappointing” for an examiner of his grade and experience and that major improvements were expected for 2018. Consequently, the overall marking of the complainant’s performance was rated as “acceptable, with some areas of improvement, which ha[d] been addressed with [him]”.

As the complainant disagreed with the assessment of his performance, a conciliation meeting took place on 17 April 2018, following which the report was confirmed. On 7 May 2018, he raised an objection with the Appraisals Committee.

In its opinion of 13 June 2018, the Appraisals Committee concluded that there was no evidence that the assessment of the complainant’s performance and of his appraisal report had been discriminatory or arbitrary. It recommended rejecting his objection as unfounded and confirming his appraisal report. 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. He also seeks an amendment of his appraisal report so that the overall marking of his performance be rated as “above the level required

for the function”. Additionally, he requests that the EPO be ordered to correct the flaws in the performance management system, to “stop setting targets that are heavily correlated with the age of staff” and to “make public the criteria by which objectives are set, so that arbitrary objective setting can be directly checked instead of indirectly”. He claims moral and exemplary damages in the amount of no less than 3,000 euros, as well as moral and real damages for the “missed chance of promotion” to grade G13, step 1.

The EPO considers the complaint to be irreceivable insofar as the complainant requests an amendment of his appraisal report. It argues that the claim for real damages is irreceivable as the decision not to promote the complainant is a separate and distinct decision. It requests that the complaint be dismissed as partly irreceivable and unfounded. Should the Tribunal decide to set aside the appraisal report, it notes that such ruling would be deemed to afford sufficient redress to the complainant.

CONSIDERATIONS

1. The complainant impugns the decision of 19 July 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) quash the impugned decision;
- (2) amend the appraisal report so that overall marking of his performance be assessed to “above the level required for the function”;
- (3) order the EPO to correct the flaws in the performance management system, to “stop setting targets that are heavily correlated with the age of staff”, and to “make public the criteria by which objectives are set”;
- (4) award him no less than 1,000 euros in moral damages for the substantial stress and defamation caused by the EPO’s arbitrary and discriminatory practices;
- (5) award him no less than 1,000 euros in exemplary damages for “receiving insufficient duty of care” from the EPO;
- (6) award him no less than 1,000 euros in exemplary damages to “discourage the discriminatory and arbitrary practices performed by the [EPO]”; and
- (7) award him moral and real damages as compensation for his “missed chance of promotion” to grade G13, step 1.

3. The complainant’s requests in items (2) and (3) must be rejected as the Tribunal is not competent to issue orders of this kind. Concerning particularly item (2), 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.

As the EPO rightly points out, the complainant's claim in item (7), that is, awarding him moral and real damages for the "missed chance of promotion", is outside the scope of this case, as this case only pertains to his appraisal report for 2017 (see, for example, Judgments 4794, consideration 15, 4790, consideration 5, and 4726, consideration 7).

4. The complainant challenges his 2017 appraisal report on three procedural grounds. He submits that (1) the composition of the Appraisals Committee was unbalanced and its members lacked independence and impartiality under the new system embodied in Circular No. 366, as the Committee was constituted solely by representatives of the Administration and was chaired by the Head of Human Resources; (2) the mandate of the Committee was "restricted" to determine whether his 2017 appraisal report was arbitrary or discriminatory, which was unlawful and breached the duty to substantiate a decision; and (3) the procedure before the Committee did not equate to an internal appeal and amounted to a denial of justice. It is noteworthy that the complainant's arguments 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). For the same reasons, the complainant's arguments are rejected as unfounded.

5. The complainant further alleges substantive irregularities in his 2017 appraisal report, mainly on the following grounds:

- (1) the reporting officer drew manifestly erroneous conclusions concerning the productivity standards;
- (2) the EPO breached its duty of care by not warning him that his overall performance marking would be negative;
- (3) by taking his grade, age and salary scale into account, the setting of objectives was arbitrary and discriminatory; and

(4) his past performance was ignored, and the assessment of his performance lacked legal basis as no defined yardstick was lawfully published.

The complainant also alleges that the hostile working environment in 2017 was created by the reporting and countersigning officers and that “constructive dismissal tactics” were applied through discriminatory target settings and evaluations.

6. 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.)

7. The Tribunal finds no merit in the complainant’s submissions in this complaint to move it, based on its limited power of review as stated in considerations 3 and 6 above, to quash the impugned decision and the appraisal report. The complainant has not discharged his burden of proof in demonstrating that the reporting and the countersigning officers acted partially or lacked objectivity (see, for example, Judgments 4637, consideration 17, 4543, consideration 8, 4382, consideration 11, and 3380, consideration 9). Contrary to his assertions,

the overall marking he received means that his performance was evaluated as acceptable, with some areas of improvement. This rating was substantiated by the reporting and the countersigning officers based on the fact that the complainant did not completely achieve the planned productivity objectives. Furthermore, the complainant's allegations of a hostile working environment and "constructive dismissal tactics" are unsubstantiated and thus unfounded.

8. Regarding the complainant's allegation pertaining to a lack of "warning" at the intermediate review meeting stage, Section B(5)(a) of Circular No. 366 relevantly provided the following:

"The reporting officer informs the staff member at the intermediate review meeting if the performance observed since the beginning of the appraisal period is such that there are serious doubts that the agreed objectives will be reached by the end of the appraisal period, or if the level of competencies demonstrated lies below what can reasonably be expected for the function, grade and experience of the staff member. In particular, the reporting officer informs the staff member if he is likely to receive an overall assessment which is below what is acceptable. The reporting officer records the identified deficiencies in the electronic tool, together with the improvement measures agreed and the possible consequences of not achieving the objectives or improving the level of competencies."

In this case, the complainant's overall performance was assessed as "acceptable, with some areas of improvement, which ha[d] been addressed with [him]", and, therefore, the situation did not warrant an obligation to inform the complainant within the meaning of Section B(5)(a) of Circular No. 366, nor was there an obligation for the reporting officer to "warn" the complainant at the intermediate review meeting. Nevertheless, during the intermediate review meeting of 20 June 2017, the reporting officer did inform the complainant that he had delivered 14 searches and 15 final actions in examination, which amounted to only 31 per cent of the planned yearly productivity objectives. The complainant's allegation is unfounded.

9. The complainant's allegation of arbitrary and discriminatory setting of his objectives is misplaced. Section B(3) of Circular No. 366 relevantly provided that "[t]he objectives to be set at the individual level

must be linked to the different job profiles and take into account the grade of the staff member". Given that the complainant was an experienced examiner holding the higher grade of G12, step 5, setting his productivity objectives higher than those established by the Peer Reference Examiner standards was not inappropriate. According to the well-established case law of the Tribunal, the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 4277, consideration 21, and 4274, consideration 21). The complainant has failed to provide sufficient evidence to establish that discrimination has occurred in the setting of his objectives. His allegation is unfounded.

10. The Tribunal agrees with the Appraisals Committee that no evidence or arguments have been provided to substantiate that the appraisal report was arbitrary or discriminatory. The Vice-President of DG4 therefore correctly accepted this conclusion in the impugned decision. The performance appraisal was based on objective and transparent criteria, governed by the rules set out in Article 47a of the Service Regulations for permanent employees of the European Patent Office and Circular No. 366. The complainant's assumption that his past performance should be considered is unmeritorious. There is no authority that permits the complainant's 2017 appraisal report to take into consideration his previous reports. The Tribunal observes that an appraisal report, the purpose of which is to assess an employee's merits over a given period and which is drawn up according to the rules governing the evaluation exercise for the period in question, is an entirely separate document from previous appraisal reports (see, for example, Judgments 4564, consideration 6, and 1688, consideration 6).

11. 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).

12. 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