

F. (No. 15)

v.

EPO

139th Session

Judgment No. 4984

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complaint filed by Mr S. C. F. against the European Patent Organisation (EPO) on 23 July 2018, the EPO's reply of 9 January 2019, the complainant's rejoinder of 20 February 2019 and the EPO's surrejoinder of 3 June 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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". The latter 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. The supersession of Circular No. 246 by Circular No. 366 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 European Patent Office, the EPO's secretariat, adopted the Guidelines on performance development, which entered into force on 1 January 2018, and superseded any earlier circular relating to performance management (including, notably, Circular No. 366) and any other instruction and/or guidance on that same matter.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 material times, the complainant was a permanent employee of the European Patent Office working as an examiner and a 50 per cent staff representative. He retired on 1 December 2018.

At the beginning of the reporting period for 2017, several objectives were established regarding the assessment of his performance. In a note dated 13 March 2017, he objected thereto arguing that some of his duties and his staff representative activities had not been considered and raised that there were illegitimate interferences into the responsibilities of the Examining Division from his reporting officer. The objectives set for 2017 were confirmed by the countersigning officer on 22 March 2017.

During the intermediate review meeting held on 14 July 2017, the complainant was informed by his reporting officer that his productivity was below what could be expected from him. A second review meeting was held on 5 December 2017. In his appraisal report for the period from 1 January 2017 to 31 December 2017, his overall performance was assessed as "acceptable, with some areas of improvement, which [had] been addressed with [him]". The complainant disagreed with the assessment of his performance on the main ground that he suspected

partiality from his reporting and countersigning officers. On 29 March 2018, he made a request “for a conciliation/objection procedure in the sense of point III.7 of the ‘Guidelines on performance development’”.

A conciliation meeting took place on 24 April 2018, following which the report was confirmed.

On 7 May 2018, the Department of Performance Management reminded the complainant to process his appraisal report. He replied on the same day stating that Circular No. 366 – which had been replaced by the Guidelines on performance development – did not appear to be applicable anymore “since [he was] already after the conciliation meeting where no agreement could be reached for reasons of suspicion of partiality”. He further indicated that he still disagreed with the reporting and countersigning officers. Another reminder was sent to him on 17 July 2018. On 23 July 2018, the complainant answered that Circular No. 366 was not in force anymore and that he intended to “pursue the case together with [his fourteenth complaint]”, in which he had challenged his appraisal report for 2016.

On the same day, the complainant filed the present complaint directly with the Tribunal. He asks the Tribunal to set aside the implicit decision resulting, in his view, from the failure to reply to his claim of 7 May 2018 and to declare that his 2017 appraisal report is null and void. He seeks compensation for procedural violations, moral damages, costs and interest on all amounts due. On a subsidiary basis, he asks the Tribunal to declare the whole appraisal procedure as null and void *ab initio*, to remit his case to the EPO for an examination involving impartial reporting and countersigning officers and/or a duly composed Appraisals Committee or Internal Appeals Committee as the Tribunal sees fit, and to award him 4,000 euros in compensation for the procedural delays and violations, and costs.

The EPO notes that, by failing to raise an objection with the Appraisals Committee, the complainant did not exhaust the internal means of redress. It further contends that the complainant’s cause of action lapsed when he retired on 1 December 2018. It requests the Tribunal to dismiss the complaint as irreceivable and, on a subsidiary

basis, as unfounded in its entirety. Alleging abuse of process, the EPO asks that the complainant be ordered to pay 1,000 euros in costs.

CONSIDERATIONS

1. Since the provisions, as well as the general principles concerning the Tribunal's power to review appraisal reports, 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, 6 and 7 of that judgment which contain those provisions and the general principles, making it unnecessary to reproduce them in the present judgment.

2. The EPO submits that, inasmuch as the complainant retired on 1 December 2018 and is no longer an active employee of the EPO, he no longer has a cause of action to challenge the contested appraisal report and the main claim by which he seeks to obtain a new appraisal report for the 2017 period 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 he received, it would have no impact on his career advancement. This submission is unfounded by reference to the Tribunal's statement 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. The complainant has requested oral proceedings. However, in view of the ample and sufficiently clear written submissions and documents produced by the parties, the Tribunal considers that it is fully informed about the case and will not, therefore, grant this request.

4. The complainant's application for the joinder of this complaint with other complaints he has filed with the Tribunal, including his seventh and fourteenth complaints in which he had challenged his 2015 and 2016 appraisal reports, is rejected as they do not raise the same or even similar issues of fact and law. Concerning more particularly his seventh and fourteenth complaints, they were the subject of Judgments 4726 and 4789 respectively, delivered in public on 7 July 2023 and 31 January 2024, so that his request for the joinder with these two complaints is moot.

5. The EPO submits that this complaint is irreceivable under Article VII, paragraph 1, of the Statute of the Tribunal, which states that "[a] complaint shall not be receivable unless the decision impugned is a final decision and the person concerned has exhausted such other means of redress as are open to her or him under the applicable Staff Regulations".

6. The record discloses that, after the complainant disagreed with the evaluation of his 2017 performance by his reporting and countersigning officers, a conciliation meeting took place on 24 April 2018 in accordance with Section B(11) of Circular No. 366. Notably, Section B(12) of Circular No. 366 required a staff member who was still dissatisfied with the appraisal report after the conciliation procedure, and wished to pursue the matter, to request that the matter be taken further by raising an objection with the Appraisals Committee within ten working days. The complainant however filed this complaint directly with the Tribunal without raising an objection with the Appraisals Committee. Article 110a(5) of the Service Regulations for permanent employees of the Office also stated that "[t]he competent authority shall take a final decision on the objection, having due regard to the assessment of the Appraisals Committee". As well, Article 113(2) of the Service Regulations stated that "[a] complaint may be filed with the Tribunal only when the individual decision contested is final and all internal means of redress are either excluded or otherwise exhausted".

7. The complainant explains that he filed this complaint directly with the Tribunal because “[i]t appears that the appraisal report for 2017 cannot be challenged before the Appraisal[s] Committee for reasons of suspicion of partiality (see the last sentence of the last paragraph of [Section] III.7 of the Guidelines) against [his] reporting officer [...] and [his] countersigning officer[s] [...] who were already acting during the [performance] appraisal [exercise for] 2016”. This is a reference to the Guidelines on performance development, which were adopted by the President of the Office by a decision dated 20 December 2017. The decision indicated that the Guidelines would enter into force on 1 January 2018 and supersede any earlier circular, instruction or guidance relating to performance management (including, notably, Circular No. 366). It further stated that, “for the 2017 performance assessment, Circular [No.] 366 will continue to apply up to the phase of the completion of the report and submission to the staff member. In case of conciliations related thereto, the present guidelines will apply.” This was restated in Section IV of the Guidelines.

8. By relying on this statement to bypass the requirement to submit an objection to his 2017 appraisal report with the Appraisals Committee, the complainant misinterpreted the last paragraph of Section III.7 of the Guidelines on performance development which stated that “[a]ny staff member who is still dissatisfied with [her or his] year-end report following conciliation may challenge it by raising an objection with the Appraisals Committee by written procedure within two weeks of receipt of the conciliation report or by 15 May, whichever is the sooner. The appraisal report may only be challenged on grounds of arbitrariness and/or discrimination.” As the complainant failed to raise an objection with the Committee to contest his 2017 appraisal report, as this provision, as well as Section B(12) of Circular No. 366, Articles 110a(5) and 113(2) of the Service Regulations required, this complaint is irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal. It will accordingly be dismissed.

9. The EPO seeks an order for costs against the complainant on the basis that his complaint was frivolous (see Judgments 4722, consideration 6, 4717, consideration 4, and the case law cited therein). It was, and for the reasons the EPO gave. In proceedings where costs are ordered to be paid by one party, usually the defendant organisation, to another party, usually a successful complainant, the amount of costs will usually depend on the nature of the legal representation of the successful party. If the successful party was represented by external lawyers, they are usually paid 10,000 euros or an equivalent amount. In point of principle, once liability to pay costs is established, the amount should be the same. In this case, the EPO was represented by external lawyers. However, the EPO explicitly limits its claim for costs to 1,000 euros. Accordingly, costs of that amount should be ordered. The complainant, a frivolous litigant in these proceedings, should be ordered to pay the EPO 1,000 euros.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The complainant shall pay the EPO costs in the amount of 1,000 euros within sixty days of the date of the public delivery of this judgment.

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