

H. (No. 5)

v.

EPO

139th Session

Judgment No. 4985

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr A. H. against the European Patent Organisation (EPO) on 6 December 2018 and corrected on 18 January 2019, the EPO's reply of 2 May 2019, the complainant's rejoinder of 23 July 2019 and the EPO's surrejoinder of 30 October 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 4793, delivered in public on 31 January 2024, concerning the complainant's third complaint. Suffice it to recall that the complainant has been a permanent employee of the European Patent Office, the EPO's secretariat, since 2001. At the material time, he was working as an examiner.

In 2004, he started suffering from severe medical problems which resulted in various absences on sick leave. His health condition stabilized in 2007, but from 2008 onwards it deteriorated again, leading to a gradual reduction of his weekly working hours. On 29 April 2016,

he reached the applicable maximum period of sick leave foreseen in Article 62a(7)(b) of the Service Regulations for permanent employees of the Office. The EPO's medical practitioner considered that his situation warranted a reduced working time. His degree of incapacity was assessed at 37.5 per cent in May 2016 and at 50 per cent in October 2016. His working time was reduced accordingly. During the 2017 reporting period, the complainant's degree of incapacity was assessed at 50 per cent and his working time was set at 20 hours per week.

At the beginning of the reporting period for 2017, several objectives were established regarding the assessment of the complainant's performance on the basis of his reduced working time. The reporting officer indicated that those objectives would be revised during the year "depending on the 'Medical opinion' of the medical counsellor" but noted that they were set "well below the performance expected for an examiner having G12 grade and 16 years of experience". In addition to the reduced objectives, the complainant was given constant tutoring and feedback through regular meetings with his supervisors.

A first intermediate review meeting was held on 4 July 2017, during which his supervisors noted that, although there was an increase in both production and productivity in the second quarter of the year, they remained below what was planned. A second meeting was held on 18 October 2017 where the complainant was informed that his performance was likely to receive an overall marking of "unacceptable in relation to the level required for the function", unless there was a significant productivity increase in the following weeks.

After a prior interview held on 22 March 2018, the complainant received his appraisal report for the period covering 1 January 2017 to 31 December 2017, in which his overall performance was eventually assessed as "unacceptable in relation to the level required for the function". In the report, the reporting officer cited all the support measures put into place to help the complainant improve his performance and indicated that he had failed to reach an acceptable standard of performance. This was confirmed by the countersigning officer on 28 March.

Disagreeing with the content and the marking contained in his report, on 19 April 2018, the complainant argued that his state of health had not been taken into account in the performance evaluation and indicated that he should have received an overall performance marking of “acceptable”. On 3 May 2018, he requested that a conciliation procedure be initiated.

A conciliation meeting took place on 9 May, following which the report was confirmed. On 23 May, the complainant raised an objection with the Appraisals Committee suggesting that the overall marking of his performance be assessed as “acceptable”.

In its opinion of 20 July 2018, 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 that a new appraisal report be issued “that fully takes into account his inab[ility] to work like a ref[e]rence examiner due to his state of health” and that his productivity results be assessed on that basis. He also asks the Tribunal to find that Circular No. 366 and Article 110a of the Service Regulations are inapplicable, to declare that the composition of the Appraisals Committee is unlawful and to order the EPO to establish an Appraisals Committee with an equal number of members appointed by the management and by the Staff Committee. He claims “moral/exemplary damages” in an amount of 10,000 euros, costs and interest at the rate of 5 per cent per annum on all amounts awarded, and such other relief as the Tribunal deems necessary, just and appropriate.

The EPO considers the complaint to be irreceivable insofar as the complainant requests an amendment of his appraisal report, a change in the composition of the Appraisals Committee and any other relief as the Tribunal deems necessary, just and appropriate. It also contends that, concerning the claim on the alleged illegality of Circular No. 366 and

Article 110a of the Service Regulations, the complainant may only request that the aspects of these general decisions giving rise to an individual implementation be set aside. The EPO 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's request to order that the EPO issues a new appraisal report for 2017 in which his inability to perform his duties (due to his medical condition) be taken into account and the productivity results be assessed on that basis is rejected as the Tribunal does not issue orders of this kind. The Tribunal however observes that it may, if appropriate, set aside the contested appraisal report at the same time as the impugned decision and remit the matter to the EPO for review.

2. The complainant's request for the Tribunal to find that Circular No. 366 and the underlying Article 110a of the Service Regulations for permanent employees of the Office are inapplicable is also rejected. The Tribunal's case law makes it clear that staff members may only challenge a general decision to the extent that they impugn an individual decision, stemming from that general decision, concerning them (see, for example, Judgments 4793, consideration 2, and 3494, consideration 4). In any event, the Tribunal has rejected claims to set aside Circular No. 366 made in a number of judgments in which appraisal reports established under it were challenged (see, for example, Judgments 4793, consideration 2, 4718, consideration 6, and 4714, considerations 8 and 9). It has also rejected claims to set aside Article 110a of the Service Regulations (see, for example, Judgment 4713, considerations 6, 9 and 10, and the case law cited therein).

3. The complainant's request to declare that the composition of the Appraisals Committee is unlawful is rejected as unfounded as the Tribunal has already upheld the legality of the composition of the

Committee in a number of judgments (see, for example, Judgments 4793, consideration 3, 4713, consideration 9, 4637, consideration 11, and 4257, considerations 12 and 13). By extension, the complainant's request to order the EPO to establish an Appraisals Committee with an equal number of members appointed by the management and by the Staff Committee is also rejected.

4. In challenging the contested appraisal report, the complainant contends that his medical condition was not properly taken into account in establishing the objectives for his 2017 performance appraisal period. He refers to the role the EPO's Occupational Health Service (OHS) and the Medical Advisory Unit (MAU) played in assessing his health situation and establishing the nature and degree of his disability. He states, in particular, that the MAU did not reason its medical opinion (which was taken into account in setting his objectives) and did not take into account the recommendations in the medical evaluation which had been made on 13 March 2015 or the findings contained in the medical report dated 25 May 2015.

The EPO submits that the complainant's attempt to discuss the OHS medical recommendations goes beyond the scope of the dispute as the issue at stake in this complaint pertains to the appraisal of performance and not to the assessment of the complainant's health situation. It further submits that the complainant's additional attempt to discuss his previous performance evaluations also falls outside the scope of this complaint. The complainant's response to the effect that previous appraisal reports can be taken into account because they are not independent from each other and in none of them did the EPO consider in an appropriate manner his disability due to mental illness 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).

5. 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.

6. Regarding the merits, in its opinion, the Appraisals Committee noted that the complainant was awarded an overall performance rating of "unacceptable in relation to the level required for the function". It summarized, as follows, the objections the complainant raised to his appraisal report: his performance was negatively impacted by his chronic medical condition and due to an accident in 2017; the target that was set in his objectives did not reflect the situation and it had not been taken into account in the assessment; the working practice in the team had changed in a way which hindered his production; the competencies were not properly explained to him and were set in an arbitrary way; and the change of coach in 2017 and the fact that the Team Manager acted as a coach might have created a conflict of interest. The complainant requested to have his overall performance rating upgraded to "acceptable".

7. In rejecting the complainant's objection on the basis that he had not provided any evidence or arguments to prove that the appraisal report was arbitrary or discriminatory, the Appraisals Committee stated that it appeared that the objectives that were set by the complainant's reporting officer took into account his medical situation. The result was that his objectives had been set at 50 per cent reduced working time, which was well below the performance expected of him as an examiner in his grade and with 16 years' experience, which he still did not achieve. The Committee further noted the complainant's reporting officer's statement that the change in the working practice in the complainant's unit, whereby he no longer had to participate in oral proceedings, had created a positive result. That had allowed the unit to conclude more cases in writing and freeing more time for Search Engine

Optimization. It was therefore not evident how an improvement in the general efficiency within the unit could have negatively impacted the complainant's production. The Committee concluded, in effect, that the complainant's competencies were not set in an arbitrary way because they, as well as what was expected of the complainant, were discussed with him at the meeting with his reporting officer and the competencies expected of an examiner were set out in a specific Guidance. The Committee further concluded that having his Team Manager act as a coach was a managerial decision for effectiveness and did not create a conflict of interest inasmuch, among other things, as it was also the role of the Team Manager to coach and guide members of the team.

It is evident from the record that this assessment and the conclusions were open to the Appraisals Committee. 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 Directorate-General 4 therefore correctly accepted this conclusion in the impugned decision.

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. 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).

9. 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