

L. (H.) (No. 2)

v.

EPO

139th Session

Judgment No. 4986

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr H. L. against the European Patent Organisation (EPO) on 3 August 2018 and corrected on 21 August 2018, the EPO's reply of 9 January 2019, the complainant's rejoinder of 11 February 2019, the EPO's surrejoinder of 29 May 2019, the complainant's additional submissions of 19 June 2019 and the EPO's final comments thereon of 9 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.

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 2014 as an examiner at grade A3. At the material time, he was working in Directorate 1954 and held grade G11, step 3.

During the intermediate review meeting held on 26 June 2017, the complainant was informed by his reporting officer that the results he had achieved during the first five months of 2017 were significantly above the quota of the full year's objectives, which were set above the expected level of performance for an examiner in his grade, and that his level of performance was "remarkable" for an examiner who had joined the Office in 2014.

After a prior interview with his reporting and countersigning officers held on 28 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 "over-achieved his production objective[s]" but stressed that three incidents had significantly affected his quality and competencies, namely that the latter had "deliberately and actively obstructed the achievement of the [D]irectorate's priority-1 objective" by failing to submit two search files by the given deadline and wasted valuable search and examination time during a patent granting procedure by summoning an applicant with an objection without being able to justify his decision, and had intended to send disparaging statements with the aim of damaging the reputation of a colleague. On 25 March 2018, the countersigning officer indicated that these events "display[ed] a profound lack of professionalism and competency levels below those that [he] expect[ed]" and added that achieving the production objectives was the "absolute minimum required of an examiner and [did] not absolve [the complainant] from showing appropriate respect to colleagues and meeting other objectives". The complainant was invited to reflect on his conduct and put every effort into making substantial improvements in 2018. Consequently, the overall marking of the complainant's performance was rated as "not corresponding to the level required for the function".

As the complainant disagreed with the assessment of his performance, a conciliation meeting took place on 11 April 2018, following which the report was confirmed. On 27 April 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 his appraisal report had been discriminatory or arbitrary. It recommended rejecting his objection as unfounded. 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, as well as his 2017 appraisal report. He also seeks an amendment of the said report so that the overall marking of his performance be rated as at least "corresponding to the level required for the function" and the evaluation of his functional and core competencies be upgraded to "advanced". Additionally, he requests that his case be remitted to the EPO in order that a new appraisal report may be prepared by impartial officers and reviewed by an independent and impartial organ having a balanced composition. He claims moral damages in the amount of 10,000 euros and 1,500 euros in costs. Finally, he requests the award of a retroactive step advancement but subsequently withdraws this claim in his rejoinder.

The EPO considers the complaint to be irreceivable insofar as the complainant requests an amendment of his appraisal report. 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. At relevant times, the regulatory framework for appraisal reports for the 2017 period was provided in Circular No. 366. At the same time as this circular took effect, the Administrative Council issued decision CA/D 10/14, which introduced a new career system in the EPO. Since the provisions applicable to this complaint are the same as those cited in Judgment 4718, delivered in public on 7 July 2023, the Tribunal refers to considerations 2 and 3 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) quash his 2017 appraisal report;
- (3) quash the overall unsatisfactory rating he received in his 2017 appraisal report;
- (4) change the overall unsatisfactory rating to at least "corresponding to the level required for the function";
- (5) quash the evaluation of the functional and core competencies;
- (6) upgrade the evaluation of those competencies to "advanced";
- (7) award him moral damages; and
- (8) award him costs.

The complainant has withdrawn his request for the award of a retroactive step advancement in his rejoinder.

Additionally, the complainant requests the Tribunal to refer this complaint back to the EPO for it to issue a new appraisal report prepared by impartial reporting and countersigning officers and reviewed by an independent and impartial organ with a balanced composition.

3. The complainant's requests for the orders stated in items (4) and (6) must be rejected as the Tribunal is not competent to issue orders of this kind. In the main, these requests involve 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 Judgment 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 the Tribunal's power to change the overall assessment rating or to upgrade the evaluation of the functional and core 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 first alleges that the composition of the Appraisals Committee was unbalanced and its members lacked independence and impartiality; that the lack of oral proceedings before the Appraisals Committee breached his right to be heard; and that there was a lack of proper consultation of the General Advisory Committee or the General Consultative Committee when adopting Circular No. 365 containing the "General Guidelines on the EPO Competency Framework". 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, considerations 8 and 9, and 4718, considerations 8 to 11). For the same reasons, the complainant's arguments are rejected as unfounded.

5. The complainant further alleges substantive irregularities in his 2017 appraisal report, namely the lack of “warning” that his performance could be assessed as below what is acceptable at the intermediate review meeting, the lack of objectivity and impartiality of the reporting and countersigning officers, and the unsubstantiated, discriminatory and arbitrary setting of his functional and core competencies. He stresses that the reporting officer gave undue weight to three incidents when assessing his performance and that he was unduly characterized as “underperformer”.

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 power of review as stated in consideration 6 of this judgment, to quash the impugned decision and the appraisal report or to issue the related orders sought by him. 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, Judgment 4637, consideration 17).

Regarding the complainant's allegation of a lack of "warning" at the intermediate review meeting, Section B(5)(a) of Circular No. 366 relevantly provided that "[t]he 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."

In the present case, only the first incident pertaining to the complainant's intention to send disparaging statements that were likely to damage the reputation of his colleague had occurred at the time of the intermediate review meeting, and the remaining two incidents occurred towards the end of the reporting period. The reporting officer, at the relevant time, was not contemplating an overall marking of "not corresponding to the level required for the function". 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. The complainant's reliance on Section B(5)(a) of Circular No. 366 for the issuance of a "warning" is misplaced.

As regards the complainant's allegation regarding the alleged unsubstantiated, discriminatory, and arbitrary setting of his functional and core competencies, according to the Tribunal's well-established case law, the burden of proving such allegations – which, in reality, amounts to accusing his reporting and countersigning officers of bias – rests with the complainant, and mere suspicion is clearly insufficient (see, for example, Judgments 4637, consideration 17, and 4010, consideration 9). In this case, the complainant has failed to provide any credible evidence showing that his functional and core competencies

were evaluated on discriminatory or arbitrary grounds. His arguments regarding competency settings appear to be a disagreement with the weight given to certain incidents, rather than evidence of unfair treatment. Accordingly, this allegation must be dismissed as devoid of merit.

The Tribunal agrees with the Appraisals Committee that no evidence nor arguments have been provided to substantiate that the report was arbitrary or discriminatory. The Vice-President of DG4 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 in its entirety.

10. The complainant's request for disclosure of confidential documents is rejected as the documents he requests concern other staff members and are not relevant to the matters he challenges in the present case.

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