

J. (No. 5)

v.

EPO

136th Session

Judgment No. 4715

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr P. J. against the European Patent Organisation (EPO) on 26 August 2016, the EPO's reply of 9 March 2017, the complainant's rejoinder of 30 May 2017 and the EPO's surrejoinder of 8 September 2017;

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 staff report for 2014.

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, with one qualification, embodied in Circular No. 366, entitled "General Guidelines on Performance Management". The qualification is that Circular No. 366 contained a transitional provision declaring that Circular No. 246 would still apply to staff reports covering the period up to 31 December 2014 "as far as concerns the content of the staff report and the procedure up to Part X of the report". However, the same transitional provision declared that the new

procedures in Circular No. 366 for conciliation and subsequent steps would apply to reports relating to that earlier period. The supersession of the former circular by the latter circular 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 1990. As part of his performance appraisal for the period from 1 January to 31 December 2014, the complainant had a prior interview with his reporting officer on 31 March 2015. A first version of the report was signed by the latter and by the countersigning officer on 1 April 2015. The complainant received the markings "very good" for the quality of his work and his job-related aptitude, and "good" for his productivity, attitude to work and dealings with others and for the overall rating. Disagreeing with some aspects of his report, he submitted written comments on 23 April. The reporting officer provided his final comments on 4 May 2015, rejecting the complainant's comments, and the countersigning officer signed the report on the following day without expressing any view.

On 6 May 2015, the complainant requested that a conciliation procedure be initiated. A meeting took place on 20 May, following which the report was amended in light of some of his comments. Nonetheless, on 24 June 2015, he raised an objection with the Appraisals Committee arguing that his report was flawed and arbitrary, and raised several procedural issues relating, among other things, to the application and lawfulness of Circular No. 366. He requested that the dispute be resolved in accordance with Circular No. 246, that Circular No. 366, decision CA/D 10/14 and Article 110a of the Service Regulations be declared illegal, and that Circulars Nos. 355 and 356 relating to the Staff Committee be repealed insofar as impacting his right to have a fair and objective staff report, and a fair and impartial conflict resolution procedure. He also claimed an award of damages and costs.

In its opinion of 9 May 2016, the Appraisals Committee recommended that the complainant's objection be rejected and his staff report for 2014, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter of 2 June 2016, the Vice-President of

Directorate-General 4 (DG4) informed the complainant of his decision to follow those recommendations. That is the impugned decision.

The complainant asks the Tribunal to set aside his staff report for 2014, to declare decision CA/D 10/14, Article 110a of the Staff Regulations and Circular No. 366 illegal, to repeal Circulars Nos. 355 and 356, and to order that a new assessment of his performance be made by a true, impartial and quasi-judicial body, not only on grounds of “discrimination” and “arbitrariness”. He further seeks an award of damages and costs.

The EPO argues that the complaint is irreceivable insofar as the complainant requests that general regulations and circulars be amended or repealed, or that the Tribunal order the Organisation to issue new rules defining on which grounds the 2014 staff report should be reviewed. Accordingly, it asks the Tribunal to dismiss the complaint as partly irreceivable and unfounded.

CONSIDERATIONS

1. In the decision contained in a letter of 2 June 2016, which the complainant impugns, the Vice-President of Directorate-General 4 (DG4) accepted the opinion of the Appraisals Committee and its conclusion that the complainant had provided no evidence, or even arguments, to support his contention that the assessment of his performance in his 2014 staff report was discriminatory or arbitrary. The Vice-President therefore accepted the Appraisals Committee’s recommendations to reject the complainant’s objection and to confirm his 2014 staff report. He indicated that the report should be deemed final and placed on his personal file, together with a copy of the Committee’s opinion.

2. Since the provisions applicable to this complaint are the same as those cited in Judgment 4713, also delivered in public this day, 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.

3. The complainant requests that his 2014 staff report be set aside on procedural and substantive grounds. Substantively, he requests that the report be adjusted by inserting markings of “very good” for productivity, attitude to work and dealings with others, and for the overall rating. Procedurally, the complainant requests that the Tribunal declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal. He also requests that Circulars Nos. 355 and 356 be repealed insofar as they impact his right to have a fair and objective staff report, and a fair and impartial conflict resolution procedure. He further asks the Tribunal to order a new assessment of the disagreement on his 2014 staff report by a true, impartial and quasi-judicial body (which, in his view, the Appraisals Committee is not) and not only on grounds of “discrimination” and “arbitrariness”. He also seeks compensation under various heads and costs.

4. The EPO submits that the complaint is irreceivable insofar as the complainant requests that general regulations or circulars be amended or repealed, or that the Tribunal order the Organisation to issue new rules defining on which grounds his 2014 staff report should be reviewed. The complainant points out that he requested the Tribunal to declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal, and that Circulars Nos. 355 and 356 be repealed. This last request is clearly irreceivable as Circular No. 355, which regulates Staff Committee elections, and Circular No. 356, which makes provisions for resources and facilities that are to be granted to that Committee, had no bearing on the complainant’s 2014 staff report.

5. Concerning the other claims, inasmuch as the Tribunal’s case law states that complainants can impugn a decision only if it directly affects them, and cannot impugn a general decision unless and until it is applied in a manner prejudicial to them, they are not prevented from challenging the lawfulness of the general decision when impugning the implementing decision which has generated their cause of action (see, for example, Judgment 4563, consideration 7, and the case law cited therein).

6. Whilst contending that decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 are illegal, the complainant accepts, as he did in his objection with the Appraisals Committee, that his 2014 staff report was drawn up in accordance with Circular No. 246. He however submits that, since his staff report was governed by and drawn up under Circular No. 246, the conflict resolution procedures it contained should have also applied subsequently, rather than the conciliation and objection procedures contained in Sections B(11), B(12) and B(13) of Circular No. 366. He further submits that he had an acquired right to have the challenged staff report considered in accordance with the conflict resolution procedures contained in Circular No. 246, including having the assistance of conciliators and experts who had sufficient time and resources to carry out their functions. He also submits that, by not doing so, the Organisation breached his right to legal certainty, violated his legitimate expectation and breached the principle of non-retroactivity.

7. The foregoing submissions are unfounded. In consideration 10 of Judgment 4637, delivered in public on 1 February 2023, quoting Judgment 4257, the Tribunal concluded that the application of the conciliation and objection procedures provided in Circular No. 366 to a 2014 staff report did not effect any change in legal status, rights, liabilities or interests from a date prior to its proclamation and so was not applied retroactively.

8. The complainant submits that Article 110a of the Service Regulations is illegal because it restricted the Appraisals Committee's mandate to determining whether a staff report was arbitrary or discriminatory, disregarding other grounds for invalidating a discretionary decision. This submission is unfounded. In consideration 13 of Judgment 4637, referring to Judgment 4257, considerations 12 and 13, the Tribunal considered whether restricting the role of the Appraisals Committee to determining whether a staff report was arbitrary or discriminatory was lawful. The Tribunal concluded that the fact that the Appraisals Committee's mandate is confined to determining whether a

staff report is arbitrary or discriminatory does not in itself render the procedure flawed.

9. The complainant submits that the conciliation and objection procedures under Circular No. 366 lack objectivity and transparency and amount to a denial of justice, compared to the previous conflict resolution procedures provided in Circular No. 246, particularly because of the restriction on the mandate of the Appraisals Committee and the curtailment of an appeal to the Internal Appeals Committee. These submissions are also unfounded. In considerations 12, 13 and 14 of Judgment 4637, the Tribunal rejected similar arguments which were proffered against the background of the same legal framework in similar circumstances.

10. The complainant's request that Circulars Nos. 355 and 356 be repealed insofar as they affected his right to have a fair and objective staff report, and a fair and impartial conflict resolution procedure is premised on his arguments that they have curtailed the time for elected staff representatives to provide sufficient advice, assistance and representation for staff members to guarantee them adequate defence in a case and to provide equality of arms. He states that these circulars have, as such, made it impossible to expect staff representatives to help all staff members within the tight time limits provided and that there is a denial of justice. However, given the Tribunal's conclusion, particularly in consideration 12 of Judgment 4637, which, in effect, upholds the legality of the conciliation and objection procedures, the complainant's submission is unfounded.

11. Regarding the complainant's challenge to the substantive aspects of his 2014 staff report, the Tribunal finds it convenient to repeat the following statement which it made in Judgment 4564, consideration 3, concerning the limited power of review that it exercises in the matter of staff appraisals:

“[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.”

In Judgment 4637, having recalled that statement, the Tribunal observed, in consideration 13, that:

“Since the Tribunal’s power of review does not extend to determining as such whether appraisals are well founded, the fact that the Appraisals Committee’s power of review is itself confined to assessing whether an appraisal report is arbitrary or discriminatory does not affect the Tribunal’s power of review, which continues to be exercised on the same terms as previously.”

12. The complainant requests adjustments in his 2014 staff report and that it be set aside, mainly by reference to arguments that were contained in his objection letter with the Appraisals Committee. The request is unfounded. The complainant submits that that objection letter should be regarded as a fundamental part of his brief and refers to it throughout his submissions on this issue. The Tribunal has stated on a number of occasions, and recently with increasing frequency, that it is inappropriate to effectively incorporate by reference into the pleas before the Tribunal arguments, contentions and pleas found in other documents, often a document created for the purposes of internal review and appeal (see, for example, Judgment 3920, consideration 5, and the case law cited therein). The Tribunal would be entitled to disregard those contentions and pleas. In any event, the complainant criticises the limited mandate of the Appraisals Committee, suggesting, in particular, that this did not permit the Committee to take into consideration the actual assessment and it therefore did not give adequate reasons for not recommending that the report should be amended. However, quite apart from the Tribunal’s finding that the restriction of the Committee’s mandate to determining whether a staff report is arbitrary or discriminatory does not in itself render the procedure flawed, the complainant provides no

convincing proof of circumstances falling within the scope of the Tribunal's limited power of review on which to set aside the subject report.

13. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

CLÉMENT GASCON

DRAŽEN PETROVIĆ