P. (No. 26)

v.

EPO

136th Session **Judgment No. 4716**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-sixth complaint filed by Mr L. P. against the European Patent Organisation (EPO) on 31 August 2016 and corrected on 11 October, the EPO's reply of 13 March 2017, the complainant's rejoinder of 28 June 2017 and the EPO's surrejoinder of 3 October 2017;

Considering the additional document produced by the EPO on 2 February 2023 at the Tribunal's request, which was transmitted to the complainant on 3 February 2023 for information purposes;

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 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.

At the material time, the complainant was a permanent employee of the European Patent Office, the EPO's secretariat, and was, as of 31 March 2014, the appointed Secretary of the Local Staff Committee in The Hague working full-time for that Committee.

In his staff report for the period from 1 January to 30 June 2014, which was signed by his reporting officer and by the countersigning officer in January 2015, he received the markings "good" for his job-related aptitude, his attitude to work and dealings with others and for the overall rating. Quality and productivity were not assessed. On 4 February 2015, the complainant indicated that he disagreed with "both [the] markings and comments" contained in his report. On 18 February, the reporting officer replied that no amendment could be envisaged as his submission was unclear and did not refer to a specific marking or comment. The countersigning officer indicated on 23 February that he agreed with the reporting officer's assessment.

On 3 March 2015, the complainant requested that a conciliation procedure be initiated. A meeting took place on 24 March, following which no agreement was reached. On 13 April 2015, he raised an objection with the Appraisals Committee arguing, among other things, that his report was departing from a "long established and accepted practice in the Office consisting of 'freezing' the staff report of employees detached at 100 [per cent], particularly for those elected to the functions of Staff Representatives to maintain their staff report for the duration of the mandate". According to this alleged practice, he indicated that his report for 2014 "should take over the assessment of [his] last report (namely 01.02.2011 – 29.02.2012) and award [the marking] 'very good in all sections'". He requested that all comments by the

reporting and countersigning officers be deleted and that the statement by the Chairman of the Local Staff Committee covering his activities as staff representative for the reporting period be annexed to his 2014 staff report.

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 6 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 the impugned decision and to order that the abovementioned statement by the Chairman of the Local Staff Committee be annexed to a reviewed version of his 2014 report. He also seeks an award of moral damages in the amount of 15,000 euros, 20,000 euros in material damages for his "decreased career prospects", costs and any other relief which the Tribunal may consider to be just, reasonable and equitable.

The EPO argues that the claim for material damages is irreceivable as the decision not to promote the complainant in 2015 is a separate and distinct decision. Moreover, should the Tribunal decide to set aside the staff report, it indicated that such ruling would be deemed to afford sufficient redress to the complainant. The EPO requests the Tribunal to dismiss the complaint as partly irreceivable and unfounded.

CONSIDERATIONS

1. In the decision contained in a letter of 6 June 2016, which the complainant impugns, the Vice-President of Directorate-General 4 (DG4) accepted the "unanimous assessment" 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 the complainant's 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 seeks to set aside the impugned decision and his staff report for the period 1 January to 30 June 2014, as well as other remedies, including an award of 20,000 euros in material damages "in particular for his decreased career prospects that will result from the flawed report". The EPO submits that the complaint is irreceivable insofar as the complainant seeks this award of material damages. The EPO refers to the claim as one for compensation for loss of promotion, while the complainant refers to it as a claim for "compensation for the damaged opportunity for advancement". The Tribunal however notes that such details as the complainant provides to support his claim for compensation do not refer specifically to his non-promotion in 2015. The complainant's claim is receivable but unfounded.

4. The complainant's request for oral proceedings is rejected as the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and of the relevant evidence. In any event, the contentions which the complainant raises turn essentially on questions of law, which render oral proceedings unnecessary.

5. The complainant asked the Tribunal to order the EPO to disclose the Note containing instructions from the Principal Directorate Personnel (PD 4.3) to the reporting and countersigning officers on the assessment of staff reports for staff representatives. At the Tribunal's request, the EPO disclosed the said document. The Tribunal shared it with the complainant.

6. Settled case law has it that supervisors enjoy wide discretion when assessing the performance of staff members and that, where a performance report is contested, the Tribunal exercises only a limited power of review. It will determine whether the reporting process is vitiated by a formal or procedural flaw, an error of law or fact; whether a material fact was overlooked; whether there was a misuse of authority or an obviously wrong inference was drawn from the evidence; whether a plainly wrong conclusion was drawn from the facts; or whether there was abuse of authority. The Tribunal has also stated that, as a performance assessment is a value judgement within the discretionary authority of the bodies mandated to conduct it in accordance with the relevant rules, it will not substitute its own opinion for assessments made by these bodies. The limitation on the Tribunal's power of review naturally applies to both the mark given in a staff report and the comments accompanying that mark in the report. This is because a performance report serves no purpose unless a supervisor has full freedom to comment on performance. The supervisor's independence and sense of fairness being presumed, it is for the complainant to provide evidence that the staff report is flawed (see, for example, Judgments 4564, consideration 3, 3268, consideration 9, 3252, consideration 6, 2400, consideration 3, 2318, consideration 4, 2064, consideration 4, and 880, consideration 4). Moreover, inasmuch as the complainant was a staff representative at the material time, it is convenient to recall the Tribunal's statement, in consideration 19 of Judgment 3084, that an organisation must ensure that a staff member is not disadvantaged on the grounds of her or his participation in staff representation activities as the principle of freedom of association is infringed if a person is subject to a detriment or disability because of her or his activities within a staff association (see also Judgments 3414, consideration 4, and 2704, consideration 6).

7. The complainant seeks to set aside the impugned decision and, by extension, his staff report for the period January to June 2014, on the following grounds:

(1) the impugned decision is tainted with an error of law in violation of the EPO's established practice (the reporting and countersigning officers have abused their discretionary powers by adopting an inconsistent, incorrect and irregular approach);

(2) the impugned decision is unlawful as the establishment of the 2014 staff report is tainted with procedural irregularities;

(3) the impugned decision placed him at a disadvantage and breached the independence of staff representation;

(4) the impugned decision is tainted with an error of law as it applied retroactively the conciliation and objection procedures under Circular No. 366 (which came into effect on 1 January 2015) to his 2014 staff report, which was drawn up under Circular No. 246;

(5) the impugned decision is tainted with an error of law as the conciliation and objection procedures, which led to that decision, are illegal and unlawful.

8. Ground (4) is 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.

9. Regarding ground (5), the complainant submits that the Appraisals Committee did not have a legal mandate to examine his staff report because, among other things, its constitution violated the Tribunal's case law as it took the place of the Internal Appeals Committee but does not meet the requirements of a quasi-judicial body and is constituted solely of management representatives. He also submits, in effect, that the Appraisals Committee's opinion and the impugned decision are vitiated as, inasmuch as the Committee only determined whether his staff report was discriminatory or arbitrary, it did not substantiate its other flaws or its merits. These submissions are unfounded as, in considerations 11 to 14 of Judgment 4637, the Tribunal rejected as unfounded similar arguments which were proffered against the

background of the same legal framework in similar circumstances. Moreover, as the Tribunal held, in consideration 13 of Judgment 4637 (referring to Judgment 4257, considerations 12 and 13), 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 and the complainant cannot rely on that limitation to maintain that the Committee failed to substantiate its opinion.

10. Regarding ground (1), the complainant submits that the EPO had a consistent practice of "freezing" the appraisal ratings of staff members released from their posts at 100 per cent to staff representation at the level of their last staff report prior to taking up staff representation duties full time. He asserts that the practice is clearly evident from the written guidance contained in the Note to Principal Directors issued by the former PD 4.3 on 8 June 2001 concerning the harmonization of reporting practice regarding staff representatives (which his supervisors failed to follow) that, in his 2014 staff report, they should have frozen the markings and the overall rating to "very good" based on his staff report for 2011 to 2012. The complainant's supervisors should not have lowered them to "good" for his job-related aptitude and attitude to work and dealings with others, with an overall rating of "good", nor left blank the sections related to the quality of his work and his productivity and made misleading comments. He submits that, pursuant to the practice, Parts I(1) and V(2) of Circular No. 246 (under which his performance was assessed), and by reference to Article 34(2) of the Service Regulations, which, at the relevant time, stated that "[t]he duties undertaken by members of the Staff Committee and by the permanent employees appointed by the Committee [...] shall be deemed to be part of their normal service [and] [t]he fact of performing such duties shall in no way be prejudicial to the person concerned", his reporting and countersigning officers should also have left all sections of his 2014 staff report blank and annexed to it a statement from the Chairman of the Local Staff Committee concerning his work as staff representative for the reporting period.

11. The foregoing submissions are however unfounded in some respects. In the first place, the complainant has not discharged his burden to prove the existence of the practice on which he relies (see, for example, Judgments 3734, consideration 5, and 2702, consideration 11). In any event, such reliance cannot be maintained in the face of the written guidance contained in the Note issued by the former PD 4.3 in 2001 expressly to harmonize the reporting practice regarding staff representatives. It states, in part, in paragraph 1, that, for staff members enjoying a release of 100 per cent, the staff report must be drawn up but some of the assessments can be left blank. In paragraph 2, it states that, where an elected staff representative enjoys a release of less than 100 per cent, it is the responsibility of the reporting officer to ensure that the report correctly reflects the performance of the staff member as far as possible. It states, in paragraph 3, that, if the reporting officer feels unable to report on some aspects of the performance of a staff member because of staff representation activities, that particular part of the report should indicate why the corresponding assessment is left blank.

12. The 11 April 2014 Note contained instructions issued to reporting and countersigning officers and covered all reports "concerning the 2012/2013 and 2014 reporting exercise". These 2014 instructions were issued out of a concern that, recently, the Staff Committees had intervened in the staff reporting exercise and provided annexes and comments to the staff reports of staff representatives. Paragraph 2 states that only the tasks linked to the job description of a staff member can be assessed in the staff report while staff representative duties cannot be assessed within the staff reporting exercise because, among other things (purportedly under Article 34(2) of the Service Regulations), "such duties should be neither prejudicial nor beneficial to the person concerned". Paragraph 4 states that these instructions ensure that the staff report reflects sufficiently the fact of performing staff representation activities and that any input received from the Staff Committees on the performance of staff representation activities, such as additional comments or annexes, should therefore be disregarded.

13. In the second place, the complainant was not released 100 per cent to staff representation during the whole subject period. Although he was a staff representative for the period prior to 31 March 2014, under paragraph 4(a) of Communiqué No. 45 (then in force), he did not fall within the category of office holders released at 100 per cent for that purpose. He only fell within that category for the period from 31 March to 30 June 2014 when he was the Secretary of the Local Staff Committee. It is noteworthy that his countersigning officer rejected an email request dated 12 March 2014 from the Chairman of the Local Staff Committee for him to work full time for the Committee "as from today until the month of June (included)". The countersigning officer explained the purport of paragraph 4(a) to the Chairman of the Committee. In an email, dated 28 March 2014, addressed to the complainant, the countersigning officer explained to the latter, among other things, that he could continue his staff representation activities "albeit not to the absolute exclusion of the duties to which [he had] been appointed". It was from this perspective that the EPO submits that, had the complainant worked partly on staff representation and partly in the post to which he was appointed during the period prior to 31 March 2014, his reporting and countersigning officers would have had bases on which to assess the quality of his work and his productivity during the subject period.

14. In consideration 6 of this judgment, the Tribunal recalled that supervisors enjoy wide discretion when assessing the performance of staff members and that, where a performance report is contested, the Tribunal exercises only a limited power of review. As the complainant was not released at 100 per cent to staff representation for the entire period of the evaluation, the supervisors were guided by paragraph 2 of the 11 April 2014 instructions (issued specifically to guide the assessment of staff representatives during the subject period) to assess only the tasks linked to the job description of a staff member in the staff report, but not staff representative duties. Under Article 34(2) of the Service Regulations, "such duties should be neither prejudicial nor beneficial to the person concerned". The complainant relies on that provision to sustain a conclusion that his staff representative duties had

to be assessed as part of his staff appraisal, but Article 34(2) is not intended to affect the process of staff evaluation. Under the April 2014 instructions, it was open to the complainant's supervisors to assess his "aptitude" and "attitude to work" as "good". It was also open to them to provide no evaluation of the duties he performed as a staff representative, initially *de facto*, later officially released at 100 per cent to staff representation. They could not assess his tasks linked to his job description because the complainant did not perform them during the period of the evaluation in a manner that permitted their evaluation. Contrary to the complainant's submissions, the subject evaluation undertaken in that way did not involve violation of Article 34(2) of the Service Regulations. As the complainant has not established the existence of a practice of carrying over ratings from the previous reporting period where a staff representative is officially released at 100 per cent from normal duties or is performing such duties *de facto* at 100 per cent, grounds (1) and (3) are unfounded. Ground (2) is also unfounded as the complainant has not proved that the establishment of the 2014 staff report is tainted with procedural irregularities.

15. In light of the foregoing, the complaint will be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 17 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