

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**E. (No. 7)**

**v.**

**EPO**

**137th Session**

**Judgment No. 4786**

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms B. E. against the European Patent Organisation (EPO) on 2 February 2018, the EPO's reply of 11 May 2018, the complainant's rejoinder of 15 June 2018 and the EPO's surrejoinder of 24 September 2018;

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 her appraisal report for 2016.

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 1987. At the material time, she was working as an examiner at grade A4(2), step 11, and belonged to the job group 4. She was also released from her official duties on a 50 per cent basis for staff representation activities. She retired on 1 August 2018.

In March 2017, the complainant received her appraisal report for the period covering 1 January 2016 to 31 December 2016. Her overall performance was assessed as "above the level required for the function". As she disagreed with the assessment of her performance, a conciliation meeting took place on 11 April, following which the report was confirmed. On 11 May, she raised an objection with the Appraisals Committee arguing that the relevant provisions of Circular No. 366 required taking the grade and step of the staff member reported upon into account for the performance assessment and that, since she "d[id] not hold a grade/step", her appraisal report contravened the applicable rules and was arbitrary. The complainant referred to the fact that, when the new career system had been introduced by decision CA/D 10/14, some employees holding grade A4(2) were not transposed into one of the 17 grades of the new salary scale (grades G1 to G13) but retained *ad personam* the basic salary corresponding to their grade on 31 December 2014, which would be subject to future adjustments in application of the salary adjustment method. This was the case for the complainant.

In its opinion of 11 October 2017, the Appraisals Committee noted that the complainant did not put forward any substantial argument in support of her objection against her report but only raised that Circular No. 366 did not apply to her. It concluded that the Circular applied to all staff members, notably examiners, regardless of their grade, and including those who were graded A4(2) at the time of the introduction of the new career system. It recommended that the complainant's objection be rejected and that her appraisal report for 2016, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter dated 8 December 2017, 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 the issuance of a new “flawless” 2016 appraisal report. She also seeks an award of moral damages, in the amount of 200,000 euros, as well as costs.

The EPO notes that the complainant fails to discuss the appraisal of her performance, which conveys a favourable assessment, and with which she seems satisfied. It contends that the complainant misused the objection procedure against her report as a “palliative to the internal appeal” she failed to lodge against the letter of 30 April 2015 notifying her that she would not be transposed into the new salary scale. It emphasises that her grade *ad personam* and her report are two separate and distinct subject matters. The EPO requests the Tribunal to dismiss the complaint as unfounded in its entirety.

#### CONSIDERATIONS

1. The Tribunal rejects the complainant’s request for an order that the EPO issues a new “flawless” appraisal report for 2016. In the main, such request involves an impermissible determination by the Tribunal of what the appraisal should be. The Tribunal 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. It is conveniently recalled that the regulatory framework for appraisal reports for the 2016 period was provided in Circular No. 366, which took effect from 1 January 2015. It 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 complainant has engaged these procedures in challenging her 2016 appraisal report.

3. Section B(13) of Circular No. 366 contains, among other things, a provision which requires the Appraisals Committee to examine an objection raised by a staff member by reviewing whether the appraisal report was arbitrary or discriminatory. It also provides for the Appraisals Committee's assessment to be submitted to the competent authority for a final decision on the objection; for that final decision to be forwarded to the staff member, the reporting officer and the countersigning officer, together with the assessment of the Appraisals Committee; and for the filing of the decision which confirms the report (thereby deemed final) in the staff member's personal file.

When Circular No. 366 took effect, the Administrative Council issued decision CA/D 10/14, which introduced a new career system for the EPO. It redesigned notably the classification of jobs and grades, the conditions of step advancement, the promotion procedure and the performance management system. Article 37 of decision CA/D 10/14 amended Article 109(3) of the Service Regulations for permanent employees of the European Patent Office to exclude appraisal reports from the review procedure as had been the previous position. Article 39 of decision CA/D 10/14 inserted Article 110a into the Service Regulations, under the heading "Objection procedure for appraisal reports". Article 110a(1) stated that, in case of disagreement on an appraisal report, the parties to the dispute shall endeavour to settle it through conciliation. Article 110a(2) stated that an employee who is dissatisfied with her or his appraisal report at the outcome of the conciliation may challenge it by raising an objection with the Appraisals Committee. Article 110a(4) stated that the Appraisals Committee "shall review whether the appraisal report was arbitrary or discriminatory". Article 110a(5) stated that the competent authority shall take a final decision on the objection, having due regard to the assessment of the Appraisals Committee. Article 38 of decision CA/D 10/14 amended

Article 110(2) of the Service Regulations to exclude appraisal reports from the internal appeal procedure before the Internal Appeals Committee.

4. 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.”

5. Although the complainant objected to her 2016 appraisal report, neither in the internal process nor in her complaint, has she challenged the appraisal report on the basis that she should have been given an overall performance rating higher than “above the level required for the function”. The complainant’s reporting officer had commented favourably on her performance for the intermediate review, as well as for the end of the 2016 appraisal exercise. In the overall assessment for that appraisal period, the complainant’s reporting officer stated that “[t]he objectives were either met or exceeded. As in previous years, [the complainant] share[d] her extensive experience and knowledge with her colleagues in the directorate, including the team managers and the director.” In her comments on the appraisal report, the complainant had expressed disagreement with this assessment in the following terms:

“The requirements of Circular No. 366, [namely Section] B(3) [which provides] that objectives to be set at the individual level must [...] take into account the grade of the staff member and [...] [Section] B(6) [which

provides] that the appraisal report concludes with a general assessment [...] [that] compares the level of individual performance [...] with the level normally expected for the staff member's [...] grade are unambiguous. Since I do not hold a grade/step, the said provisions of Circular No. 366 cannot be met. Hence, the [appraisal] report contravenes the requirements of Circular No. 366 and is already therefore completely arbitrary. In consequence, I disagree with the report.”

6. In the review procedure involving the Appraisals Committee, the complainant contended that her 2016 appraisal report should be quashed because it did not comply with the requirements of Circular No. 366 as, pursuant to Article 57(1) of decision CA/D 10/14, she did not hold a grade that could be taken into account for the appraisal and, thus, the provisions in Circular No. 366 on performance appraisals did not apply to her. The Committee, whose opinion the Vice-President of Directorate-General 4 (DG4) endorsed in the impugned decision, noted that the scope of its mandate under Article 110a(4) of the Service Regulations was limited to determine whether the appraisal report was arbitrary or discriminatory. It stated that the complainant did not provide any evidence or arguments to support her statement that the report was arbitrary or discriminatory but claimed that Circular No. 366 did not apply to her because she had no grade for the purpose of a performance appraisal. The Committee concluded that the Circular applied to her and to all staff members regardless of their grades from the time the new career system was introduced.

7. The complainant maintains the same contention (and supporting arguments) in her complaint. She states that she considered the appraisal report to be arbitrary and that the Appraisals Committee erred by not so concluding because she did not have a grade for the purpose of the appraisal so that Circular No. 366 did not apply to her. This was notwithstanding that she had been informed in a letter of 30 April 2015 that, according to Article 57(1) of decision CA/D 10/14, her “current grade and step [would] not be transposed into the new salary scale, and [she would] keep *ad personam* the basic salary corresponding to grade A4(2) step 11 on 31 December 2014, which [was] subject to future adjustments in application of the salary adjustment method [and that she had] further advancement opportunities on assignment to a

higher job group. Until then [she would] be treated as if [she] continued to hold [her] present A4(2) function, and [would] be handled by the administrative systems independently of the new salary scales.”

Article 57(1) of decision CA/D 10/14 stated as follows:

“Employees graded in A4(2) whose basic salary on 31 December 2014 is above the amount corresponding to grade 13 step 5 in the new salary scales shall not be transposed into the new salary scales. They shall maintain *ad personam* the basic salary corresponding to their grade and step on 31 December 2014, which is subject to future adjustments in application of the salary adjustment method.”

8. The complainant argues, for example, that the remark in the letter of 30 April 2015 that she would be treated “as if [she] continued to hold [her] present A4(2) function” was completely meaningless and thereby unlawful, since grade A4(2) did not exist in the new career system; was not mentioned anywhere and could not be assigned to any of the job groups, functions, tasks, responsibilities and competencies listed in decision CA/D 10/14; and could not be correlated to any existing grades. These arguments are however unsustainable in the face of Article 57(1) of decision CA/D 10/14 under which, as the letter of 30 April 2015 had informed the complainant, she, in effect, retained her A4(2) grade in the new career system. By extension, Circular No. 366 did apply to her, as well as to other staff members, as the Appraisals Committee correctly concluded. It was her A4(2) grade and the functions attached thereto that formed the basis for setting her objectives for the 2016 performance appraisal period and for the appraisal itself. The complainant’s further arguments that are all premised on her misapprehension that she did not hold a grade at the material time are also unsustainable and accordingly unfounded.

9. 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 she has not provided any evidence or arguments proving that her appraisal report was arbitrary or discriminatory. The Vice-President of DG4 therefore correctly accepted this conclusion in the impugned decision.

10. 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 3 November 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

CLÉMENT GASCON

MIRKA DREGER