

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

R. (No. 7)

v.

EPO

137th Session

Judgment No. 4787

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms S. R. against the European Patent Organisation (EPO) on 3 March 2018, the EPO's reply of 3 July 2018, the complainant's rejoinder of 31 July 2018 and the EPO's surrejoinder of 6 November 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 has been a permanent employee of the European Patent Office, the EPO's secretariat, since 2001. At the material time, she was working as an examiner and was released from her official duties on a 50 per cent basis for staff representation activities. At the beginning of the reporting period for 2016, several objectives were established regarding the assessment of her performance. During the intermediate review meeting held on 12 July 2016, her reporting officer noted that "progress [was] as expected".

In her appraisal report for the period covering 1 January 2016 to 31 December 2016, the complainant's overall performance was assessed as "corresponding to the level required for the function". She disagreed with her performance assessment, considering that she had exceeded her productivity objectives and that she should have received a higher overall marking. A conciliation meeting took place on 7 April 2017, following which the report was confirmed. On 15 May 2017, the complainant raised an objection with the Appraisals Committee requesting, among other things, that her overall performance be assessed as "above the level required for the function" or as "significantly higher than the level required for the function" and that a specific comment found in the Section "Overall assessment by reporting officer" of her report be deleted.

In its opinion of 11 October 2017, the Appraisals Committee recommended rejecting the complainant's request to change her overall performance rating as there was no evidence that her appraisal report had been arbitrary or discriminatory. It recommended nevertheless that the case be referred back to the reporting and countersigning officers in order for them to "review the wording" of the abovementioned contested comment. 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. More specifically, it stated that the appraisal report would be referred back to the reporting and countersigning officers "in order to review the wording of the report and grant [the complainant's] request to have the [contested] comment [...] deleted". That is the impugned decision.

Further to that decision, the reporting officer amended his comment on 21 December 2017 to indicate that the complainant's performance appraisal took into account the fact that she dedicated only 50 per cent of her time to search and examination duties. The complainant filed her complaint with the Tribunal on 3 March 2018 and on 2 July 2018 she was informed that, as a gesture of goodwill, this amended comment from the reporting officer would be reworded again. She answered on the same day rejecting the rewording, which was nevertheless introduced in the final appraisal report, on which she was given an opportunity to comment.

The complainant asks the Tribunal to set aside the impugned decision and to order the issuance of a "flawless" appraisal report for 2016 so that she receives an overall performance rating of "above the level required for the function" and the comment to which she objects in the Section "Overall assessment by reporting officer" be deleted. She also seeks an award of moral damages, in the amount of 30,000 euros, as well as costs.

The EPO considers the complainant's claim to have the reporting officer's comment deleted to be moot, as it was granted with the latest version of the report in July 2018. It requests the Tribunal to dismiss the complaint as partially irreceivable and unfounded in its entirety.

CONSIDERATIONS

1. The Tribunal rejects the complainant's request for an order that the EPO issues a "flawless" appraisal report for 2016 so that she receives an overall performance rating of "above the level required for the function" rather than "corresponding to the level required for the function". 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. Regarding the complainant's request for an order that the EPO issues a 2016 appraisal report from which the comment she objects to in the Section "Overall assessment by reporting officer" is deleted, the Tribunal accepts the EPO's submission that the request has become moot because that comment was deleted in the latest version of the complainant's 2016 appraisal report, albeit that it was replaced by another comment. The Tribunal observes that, in its opinion, the Appraisals Committee recommended that the case be referred back to the complainant's reporting and countersigning officers for them to "review the wording of the report and grant the [complainant's] request to delete the [contested] comment". In the letter, dated 8 December 2017, which the complainant impugns, the Vice-President of Directorate-General 4 (DG4) stated that "as recommended by the Appraisals Committee, it is decided to refer the [appraisal] report back to the [reporting officer] and [the countersigning officer] in order to review the wording of the report and grant [the complainant's] request to have the comment [in the Section 'Overall assessment by reporting officer'] deleted". This was done, as the EPO states in its surrejoinder.

3. Regarding the comment which replaced that to which the complainant objected in the revised appraisal report (which she commented on 7 September 2018), the complainant submits that this did not comply with her request to delete it or with the Vice-President of DG4's decision to delete it, because "delete" means "remove without substitution" and not rewording. It is however apparent to the Tribunal that the term "delete" should be interpreted in the context of the EPO's rules governing appraisal reports, which required the reporting officer to enter an overall assessment of the complainant's 2016 performance. Moreover, the applicable rules gave the complainant an opportunity to reply to the revised comment. Accordingly, the complainant's request, which essentially requires the reporting officer's comment to be deleted but not replaced, is unsustainable.

The complainant's further argument, in effect, that, by amending the subject comment, the reporting officer contravened the applicable provisions governing performance appraisals as "at [that] stage the procedure for amending the [appraisal] report [was] closed" does not

take into account the fact that the deletion (and concomitant amendment) was effected because of decisions taken in subsequent proceedings aiming at challenging the appraisal report. The Tribunal observes that a note, dated 7 September 2018, was entered at the end of the revised report which stated, in effect, that the deadline had expired and the appraisal was deemed complete.

4. Since the provisions applicable to this complaint are the same as those cited in Judgment 4786, 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.

5. As the complainant challenges the impugned decision on procedural and substantive grounds, 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.”

6. Procedurally, the complainant submits that the impugned decision should be set aside because, in reviewing her 2016 appraisal report, the Appraisals Committee (whose opinion the Vice-President of

DG4 endorsed in the impugned decision) did not fulfil its mandate pursuant to Article 110a(4) of the Service Regulations for permanent employees of the European Patent Office. She argues that this provision required the Committee to determine whether the report was arbitrary or discriminatory, which means that it had to re-evaluate the report on its merits to determine whether the reporting officer's assessment was fair, objective, consistent and harmonized, as required by Article 47a of the Service Regulations and Circular No. 366, or whether, based on the facts, some other assessment should have been made. She insists that "[a]ny other interpretation of Article 110a(4) would deprive [Article 47a and Circular No. 366] of its *raison d'être*". Article 47a(1), which relevantly stated that "[t]he assessment of performance and competencies is a managerial responsibility [which] shall be conducted in a fair and objective manner", does not change the Tribunal's determination in consideration 12 of Judgment 4718 to the effect that Article 110a(4) required the Appraisals Committee, in accordance with its mandate, to fairly substantiate its opinion by determining whether an appraisal report was arbitrary or discriminatory, which the Committee did in the present case, as it will be demonstrated below.

7. The Tribunal is satisfied that, contrary to the complainant's submission, the Appraisals Committee did not misconstrue the extent of its mandate. In its opinion, the Committee stated the following concerning its power of review:

- “8. It is recalled that, [according] to Article 110a(4) [of the Service Regulations], the scope of the Appraisals Committee is limited to review whether the [...] appraisal report [is] arbitrary or discriminatory.
9. In the course of its assessment, the Appraisals Committee considers the wide margin of discretion guaranteed by the rules and confirmed by [the] case-law to the [reporting officer], the relief available to the staff member within the preceding conciliation procedure and the need of the staff member subsequently to substantiate his case in so far as arbitrariness or discrimination is invoked. Especially, there is no entitlement to any partial or overall box marking.”

The Committee then stated the well-established principle that appraisal reports are discretionary decisions that are subject to only limited review in terms similar to the statement reproduced in consideration 5

of this judgment. Nothing in the foregoing statements suggests that the Committee referred to or adopted the limitations applicable to the Tribunal's scope of review on its own power of review. Having then analysed the complainant's case, the Committee stated that, after deliberating, it concluded that "no evidence or arguments have been provided to substantiate that the [complainant's 2016 performance] assessment ha[d] been discriminatory or arbitrary". The Committee did not, in that analysis, review the subject appraisal report by reference to the principles stated in consideration 5 of this judgment. The complainant's arguments set out in consideration 6 above are therefore unfounded.

8. On the merits, the complainant's request to be awarded an overall performance rating of "above the level required for the function" rather than "corresponding to the level required for the function" is rejected as irreceivable as it is not within the Tribunal's power to change the overall assessment rating in an appraisal report (see, for example, Judgments 4720, consideration 4, 4719, consideration 7, 4718, consideration 7, and 4637, consideration 13).

9. In its opinion, the Appraisals Committee noted the complainant's statement, in her objection, that her production results and her performance had not been fairly and objectively assessed because she clearly exceeded her planned target and more than doubled the grants she was required to complete, thereby meeting the criterion to be assessed with an overall performance rating of at least "above the level required for the function". Notably, however, in her self-assessment of the objectives set for the 2016 period, the complainant stated, in the 2016 appraisal report, that she completed the 42 searches set for that period; that she completed 23 final examinations, thereby exceeding the 11 set for the period, and completed 18 communications when 15 were set. In his comments to the complainant's self-assessment, her reporting officer stated, in effect, that she had achieved and/or slightly exceeded all her objectives. Her reporting officer also noted, in particular, that she had successfully achieved her objectives in the examination phase, which showed that she had thus achieved the performance of an examiner with her experience. Commenting on the complainant's self-

assessment of the quality of her work, her reporting officer stated that she had achieved all of the set objectives.

The conciliation report had noted, among other things, the complainant's statements that the appraisal report should have better reflected the fact that she had not only achieved her objectives but that she had exceeded them, particularly in examinations, and that the overall performance rating should have been "above the level required for the function" or even "significantly higher than the level required for the function". It had also noted the reporting officer's statements, among other things, to the effect that the complainant had met her search objectives and exceeded her examination objectives; that her productivity was higher than planned and within the range for an experienced G12 examiner; that, overall, her performance corresponded fully with the level required for the function, but that a rating of "above the level required for the function" or "significantly higher than the level required for the function" was not considered appropriate as the requirements for such ratings were not met.

10. The Appraisals Committee concluded that the complainant had not provided any evidence to support her argument that the factual elements disclosed in the appraisal report were erroneous, but that, rather, she had, in effect, suggested different weighting on the various assessment criteria taken into account, which assessment lies within her reporting officer's discretion. It further stated that the reporting officer had explained to the complainant that reaching and partly exceeding her objectives was still assessed as a performance "corresponding to the level required for the function" and not "above" that level and that her countersigning officer had pointed out to her that her scope of responsibilities was still lower compared to her peers.

The Tribunal notes the statement in Section C(2)(a) of the "Guidance to Performance Assessment for Examiners in [Directorate-General 1]" (drawn up within the framework of Circular No. 366) which stated that "[a] performance at the expected level would generally be rated at the level required for the grade and function", while Section C(2)(b) stated that, "[d]epending on how much the

expected performance level is exceeded, the marking assigned can be rated as above the level [required] for the grade and function or very high approaching outstanding”. It is apparent from this latter provision that, contrary to the complainant’s submission, there may be instances in which a staff member exceeds set objectives, yet whether an overall performance rating above “corresponding to the level required for the function” is given depends on how much the set objectives are exceeded. Given this, and the Tribunal’s case law (stated in consideration 5 of this judgment) which recognises the discretionary power of the bodies responsible for conducting such an assessment, as well as the comments in the complainant’s 2016 appraisal report, the Appraisals Committee, acting within its mandate set out in Article 110a(4) of the Service Regulations, did not err in its analysis and conclusion that the complainant had, in effect, not proved that the subject appraisal report was arbitrary or discriminatory. The complainant provides no evidence to prove that her appraisal report was not done in good faith, lacked fairness and objectivity or that it was flawed because of prejudice on the part of her reporting officer, as she argues.

11. The complainant’s further submission that her 2016 appraisal report is flawed because the reporting officer’s comment she criticizes (referred to in consideration 3 of this judgment) is in breach of the applicable rules concerning the appraisal of a staff member performing staff representation duties and shows prejudice by the reporting officer is unfounded. Notably, in the overall assessment in the initial appraisal report, the reporting officer stated, in effect, that in a relatively short period of time since the complainant’s return, and working at 50 per cent as an examiner, she achieved a completely satisfactory level and that, even if her production was not outstanding, she could not be penalized because she worked 50 per cent as a staff representative. In the Section “Global comments on achievement of objectives” in the initial report, it was stated that, by virtue of her status as a staff representative, the complainant benefited during the appraisal period from an exemption from 50 per cent of her normal duties, which tasks were carried out independently, and were therefore not the subject of the report. It was also stated that she had devoted 50 per cent of her

working time to her duties as an examiner. The Appraisals Committee's remark (even if it recommended that the report be referred back to the complainant's reporting and countersigning officers) that the reporting officer's comment seemed "suboptimal and unnecessary given the unambiguous standard position under the Global comments that the tasks as staff representative [were] not [the] object of the staff appraisal" is obvious. The Tribunal observes that this remark is supported by the case law in consideration 15 of Judgment 4718.

It is also noteworthy that the overall comment in the revised appraisal report (entered by the reporting officer on 21 December 2017) stated, in effect, that, in a relatively short period of time since the complainant's return, and working at 50 per cent as an examiner, she had been able to reach a completely satisfactory level of performance and that, taking into account the particular circumstances, she had achieved a performance in line with expectations and had achieved objectives and competencies that corresponded to what was normally expected. Contrary to the complainant's submissions, the foregoing statements neither breach the applicable rules concerning staff members who are released at 50 per cent to staff representation duties nor do they show prejudice against the complainant on the part of the reporting officer. Moreover, there is no evidence from which to conclude that the appraisal report was not done in good faith or that there was a lack of fairness or objectivity, as the complainant submits.

12. 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.

13. 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