

B. (No. 9)

v.

EPO

137th Session

Judgment No. 4790

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 7 March 2018 and corrected on 16 March, the EPO's reply of 3 July 2018, the complainant's rejoinder of 17 September 2018 and the EPO's surrejoinder of 9 January 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 2016.

Facts relevant to this case can be found in Judgment 4723, delivered in public on 7 July 2023, concerning the complainant's sixth complaint. Suffice it to recall that the complainant has been a permanent employee of the European Patent Office, the EPO's secretariat, since 1990. At the material time, he was working as an examiner, but was released from his 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 the complainant's performance. In a note dated 24 March 2016, he contested those objectives which, in his view, were not reasonable.

In his appraisal report for the period from 1 January 2016 to 31 December 2016, the complainant's overall performance was assessed as "corresponding to the level required for the function". As he disagreed with his performance assessment, a conciliation meeting took place on 16 May 2017, following which the report was confirmed. On 24 May, the complainant raised an objection with the Appraisals Committee, arguing in particular that his overall rating was arbitrary. He requested that his performance be assessed as "above the level required for the function" or even better.

In its opinion of 11 October 2017, the Appraisals Committee recommended that the complainant's objection be rejected and that his 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, to order the amendment of his appraisal report for 2016 so that he receives an overall performance rating of "above the level required for the function", to declare decision CA/D 10/14, Article 110a of the Service Regulations for permanent employees of the European Patent Office, Circular No. 366 and the specific guidelines on performance assessment – namely, the "New PAX Guidelines 2.2", the "Guidance to Performance Assessment of Examiners in [Directorate-General 1 (DG1)]", the "Guidelines for Individual Quality Objective Setting" and the "Functional Competencies for Examiners", which were all published on 22 December 2014 – illegal and to repeal Circulars Nos. 355 and 356 insofar as impacting his right to have a fair and objective appraisal report, and a fair and impartial conflict resolution procedure. He further requests that the disagreement on his report be assessed by a true, impartial, quasi-judicial body not only on grounds of "arbitrariness" and

“discrimination”. He also seeks the award of “real” and “(aggravated) moral damages” in an amount of no less than 1,000 euros, as well as costs.

As regards the complainant’s claims on the alleged illegality of decision CA/D 10/14, Article 110a of the Service Regulations and Circulars Nos. 355, 356 and 366, the EPO contends that the complainant may only request that the aspects of these general decisions giving rise to an individual implementation be set aside. It further notes that the four specific guidelines on performance assessment have no binding effect on the complainant and do not underlie his appraisal report. Finally, as to the claim regarding “real” damages – which, in its view, corresponds to a request for compensation for loss of career advancement –, it argues that the complainant is not allowed to file claims about a separate and distinct decision. The EPO requests that the complaint be dismissed as partly irreceivable and unfounded.

CONSIDERATIONS

1. In challenging the impugned decision and his 2016 appraisal report on procedural and substantive grounds, the complainant asks the Tribunal to:

- (1) set aside the impugned decision, dated 8 December 2017, which confirmed his 2016 appraisal report; and
- (2) order that his 2016 appraisal report be amended so that he receives an overall performance rating of “above the level required for the function” instead of “corresponding to the level required for the function”.

In respect of procedure, he requests the Tribunal to:

- (3) declare that decision CA/D 10/14, Article 110a of the Service Regulations for permanent employees of the European Patent Office and Circular No. 366 are illegal;
- (4) declare that the four specific Directorate-General 1 (DG1) guidelines published in December 2014, namely, the “New PAX Guidelines 2.2”, the “Guidance to Performance Assessment of

Examiners in DG1”, the “Guidelines for Individual Quality Objective Setting” and the “Functional Competencies for Examiners”, are illegal insofar as they impact his right to have a fair and objective appraisal report and a fair and impartial conflict resolution procedure;

- (5) order that Circulars Nos. 355 and 356 be repealed insofar as they impact his right to have a fair and objective appraisal report and a fair and impartial conflict resolution procedure;
- (6) order that the objection to his 2016 appraisal report be assessed by a true, impartial and quasi-judicial body; and
- (7) order that all grounds for invalidating a discretionary decision (concerning the assessment of his appraisal report) be assessed not only on the bases that the assessment was arbitrary or discriminatory.

In respect of damages and costs, he asks the Tribunal to:

- (8) award him any “real” damages caused by the impugned decision;
- (9) award him “(aggravated) moral damages” in an amount of no less than 1,000 euros, in particular for the EPO’s wilful application of the new (defective) law; and
- (10) award him costs.

2. The complainant’s request in item (2) to order that his 2016 appraisal report be amended so that he receives an overall performance rating of “above the level required for the function” instead of “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).

3. The complainant’s claims in items (3) and (4) for orders declaring decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal, as well as the four specific guidelines on performance assessment which the EPO introduced in December 2014, are rejected. The Tribunal reiterates its statements in consideration 6 of

Judgment 4718 that, inasmuch as decision CA/D 10/14, Circular No. 366 and Article 110a of the Service Regulations introduced amendments to the rules for staff appraisals with effect from 1 January 2015, they can be challenged only to the extent that their provisions were applied in a manner prejudicial to the complainant and thus affected the establishment of the contested appraisal report. Additionally, inasmuch as the complainant centrally challenges his 2016 appraisal report, he can only challenge those aspects of these general decisions which had any bearing on the establishment and the content of his report. Regarding the guidelines, the Tribunal notes that they are unrelated to the establishment of the complainant's appraisal report.

4. The complainant's request in item (5) challenging Circulars Nos. 355 and 356 is only receivable insofar as those aspects of these circulars that were individually applied to his 2016 performance evaluation process be concerned. However, as the subject matter of these circulars was unrelated to the establishment of an appraisal report, the order which the complainant seeks in relation to them is irreceivable.

5. The EPO submits that the complainant's claim for "real" damages is unsubstantiated and is also irreceivable to the extent that he intends to request compensation for loss of career advancement. In the EPO's view, this is a claim for lack of promotion or step advancement, which is a separate and distinct decision, and, in effect, an impermissible extension of the scope of this complaint in which the complainant centrally challenges his 2016 appraisal report. The complainant does not substantiate this claim. It is therefore unfounded.

6. 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.

7. 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.”

8. The submissions the complainant proffers to support his challenge to the establishment of his 2016 appraisal report on procedural grounds are essentially similar to those proffered by other complainants whose challenges to the establishment of their reports were considered, for example, in Judgments 4715, considerations 8 and 9, 4637, considerations 11 to 14, and 4257, considerations 12 to 14. In these judgments, the Tribunal rejected those arguments as unfounded. It also rejects them as unfounded in this complaint.

9. Regarding the merits, in his objection with the Appraisals Committee, the complainant argued that his 2016 performance should have been assessed at an overall rating of “above the level required for the function” or even better. He submitted that his competencies were not properly assessed and that the DG1 had not developed or published more specific guidelines concerning the competency framework as foreseen by Circular No. 356 (which, in any event, was neither

mandatory nor had any bearing on the assessment of his performance). He restated his disagreement with the objectives set for the 2016 assessment period on various technical grounds, argued that, in assessing his performance, his reporting and countersigning officers overlooked special circumstances that affected his well-being and criticized the new career system. In conclusion, he submitted that the overall performance rating of “corresponding to the level required for the function” was unsubstantiated, lacked a proper basis and did not correspond with his performance, and that it was awarded in breach of proper procedure and without the benefit of a thorough and complete assessment which rendered it arbitrary.

10. Having noted the complainant’s submissions, the Appraisals Committee, in what was a thorough analysis of each objection, concluded, on the basis of its mandate under Article 110a(4) of the Service Regulations, that the complainant did not provide any evidence or arguments to substantiate his contention that his appraisal report had been arbitrary or discriminatory and that rather, his submissions reflected more a relative and subjective divergence of views than actual flaws. The Tribunal is satisfied that the Committee sufficiently substantiated its opinion within the scope of its mandate.

11. The complainant’s submissions in this complaint mirror those he made in his objection with the Appraisals Committee, particularly concerning his set objectives and the assessment of his competencies.

The Committee’s rejection of his submission that his objectives were not properly set is borne out by the record. The Committee noted, for example, that, whereas the objectives, which were set by the reporting officer and confirmed by the countersigning officer, required the complainant to conduct 40 searches and 10 examinations in 85 days were clear, specific, measurable, realistic and timely, he achieved 42 searches but only one examination within the given time. The Committee also referred to the comment made by the complainant’s countersigning officer that the objectives were set below those normally expected from an examiner with his experience and grade and working in a comparable technical field. It is also worth mentioning his reporting

officer's comment that he had not completely achieved his objectives in terms of the number of products.

The Appraisals Committee's conclusion that the complainant's productivity was properly and correctly assessed is also borne out by the record. The Tribunal observes, for example, his reporting officer's statement that, for the past 2.5 years, the complainant benefitted during the appraisal period from up to 50 per cent exemption from his official duties as a staff representative and that, since his work in that capacity was exercised independently from his examiner's duties, it did not fall within the scope of the assessment.

In sum, the Tribunal concludes that the reporting and countersigning officers' comments in the complainant's 2016 appraisal report were balanced, fair and within their discretionary power and that the Appraisals Committee's analysis was thorough and its recommendations, which the Vice-President of Directorate-General 4 (DG4) endorsed in the impugned decision, were fairly within its mandate.

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 he has not provided any evidence or arguments proving that his 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 6 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