J. (No. 8)

v.

EPO

137th Session **Judgment No. 4792**

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr P. J. against the European Patent Organisation (EPO) on 19 March 2018, the EPO's reply of 26 July 2018, the complainant's rejoinder of 10 September 2018 and the EPO's surrejoinder of 8 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 4720, 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.

Following an interview held on 3 April 2017 with his reporting officer, the complainant received his appraisal report for the period from 1 January 2016 to 31 December 2016, in which his overall performance was assessed as "above the level required for the function". Disagreeing with the content of his report, he suggested some changes on 11 May 2017.

A conciliation meeting took place on 24 May 2017, following which the report was confirmed. On 23 June 2017, the complainant raised an objection with the Appraisals Committee requesting, among other things, that his overall performance be assessed as "very high, approaching the outstanding level" or "significantly higher than the level required for the function", that all the objectives that were not relevant to him be removed from his report and that the assessment of his core and functional competencies be raised to "advanced".

In its opinion of 7 December 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 18 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 declare his appraisal report null and void and to find that the words "arbitrary" and "discriminatory", contained in Article 110a(4) of the Service Regulations for permanent employees of the European Patent Office, "be held to have the same inclusive meaning as the long-established and recognised grounds for the Tribunal to review discretionary decisions, and that any attempt to interpret them in a more restrictive manner be deemed illegal". He also seeks an award of moral damages, in the amount of 5,000 euros, as well as costs.

The EPO requests that the complaint be dismissed as unfounded in its entirety.

CONSIDERATIONS

1. In challenging the impugned decision and his 2016 appraisal report, the complainant asks for the issuance of orders which the Tribunal states as follows:

(1) to declare his 2016 performance assessment void as it infringes the mandatory applicable provisions, including Circular No. 366;

(2) to hold that the words "arbitrary" and "discriminatory" contained in Article 110a(4) of the Service Regulations to describe the Appraisals Committee's power to review performance appraisal reports have the same meaning as the recognized grounds applicable for the Tribunal's review of discretionary decisions;

(3) to award him 5,000 euros in moral damages; and

(4) to award him costs, including costs of external legal representation.

The EPO notes that the complainant does not request that the impugned decision be quashed. It however states that, paying due respect to its duty of care towards him, it considers that he intended to make that request.

2. 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.

3. 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. [...]
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> 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."

4. In his request that the Tribunal finds that his 2016 appraisal report was unlawfully established, the complainant submits that, by limiting the review mandate of the Appraisals Committee to determining only whether the appraisal report was arbitrary or discriminatory, Article 110a(4) of the Service Regulations is unclear and creates a legal void which prevented a complete review of an appraisal report. He argues that this is a form of denial of justice also limiting the scope of the Tribunal's power of review. This latter argument is untenable (see Judgments 4637, consideration 13, and 4257, considerations 12 and 13).

5. Moreover, the complainant asks the Tribunal to hold that the words "arbitrary" and "discriminatory" contained in Article 110a(4) of the Service Regulations "be held to have the same inclusive meaning as the long-established and recognised grounds for the Tribunal to review discretionary decisions, and that any attempt to interpret them in a more restrictive manner be deemed illegal". However, this is, in substance, a general request for a declaration of the legal effect of Article 110a(4) of the Service Regulations. It is not for the Tribunal to issue such declarations of law (see, for example, Judgments 4246, consideration 11, 4244, consideration 8, 4243, consideration 27, and 3876, consideration 2).

6. The submissions which the complainant proffers to support his challenge to the establishment of his 2016 appraisal report on this procedural ground are similar, if not identical, to those he proffered against the background of the same legal framework in similar circumstances in his fifth and sixth complaints, which were the subject of Judgments 4715 and 4720 respectively, delivered in public on 7 July 2023. The Tribunal therefore finds, as it did in Judgments 4715, consideration 12, and 4720, consideration 10, that those submissions should be rejected as unfounded.

7. The complainant advances the following pleas to support his contention that his 2016 appraisal report was substantially flawed: (1) the Appraisals Committee's opinion was unsubstantiated; (2) the competencies upon which he was assessed had not been updated; (3) the assessment of his competencies by his reporting and countersigning

officers was not thoroughly made; and (4) in breach of Circular No. 366, no intermediate or annual review meetings had been conducted for the 2016 appraisal period.

8. The Tribunal rejects the complainant's first plea as it is satisfied that the Appraisals Committee fairly substantiated its opinion within its mandate under Article 110a(4) of the Service Regulations. Having set out the essential facts and listed the complainant's objections against his appraisal report – namely, his statements that (1) he deserved an overall performance rating of "very high, approaching the outstanding level" or "significantly higher than the level required for the function", (2) the objectives that were not relevant to him should be removed from his appraisal report, (3) his core and functional competencies should be raised to the "advanced" level, and (4) there is a contradiction between the development of his career and his professional development –, the Committee referred to the scope of its review under Article 110a(4) of the Service Regulations, which limited it to determining whether the appraisal report was arbitrary or discriminatory. Taking into account the complainant's grade and experience, as well as the explanation he received during the conciliation meeting, the Committee concluded that the complainant's performance was assessed correctly and fairly and that he provided no evidence of any procedural or substantive flaw in the assessment of his performance.

9. Regarding the second plea, in his 2016 appraisal report, the complainant disagreed with the markings he was awarded in relation to his competencies, stating that they were not accurate and appeared to have been erroneously transferred from his previous reporting period. He provided his own self-assessment suggesting that he should be awarded markings of "advanced" for each aspect of his core and functional competencies and an overall performance rating of "very high, approaching the outstanding level" or "significantly higher than the level required for the function" (rather than "above the level required for the function") also taking into account, among other things, his academic qualifications. During the conciliation meeting, his reporting officer explained that such qualifications are not to be taken into

account for the purpose of a performance appraisal. In his complaint, the complainant states that the list of competencies and different tasks were taken from his previous post. Indeed, he was transferred in May 2016 to a position in Directorate 2843 due to an urgent need to fill the post.

10. Section A(1) of Circular No. 365 (entitled "General Guidelines on the EPO Competency Framework" and entered into force on 1 January 2015) relevantly stated that "[a] competency is a demonstrated ability to apply knowledge, skills and attitudes to achieve observable results (according to levels of autonomy and context complexity)". Section A(2) of the Circular relevantly provided, in effect, that the competencies a staff member in the complainant's position is required to possess are "core competencies" to enable the organisation to achieve its objectives and "functional competencies" which include the specific skills, knowledge and behaviour required to perform a job in a specific area. As the EPO explains, while under the applicable rules, set objectives provide a benchmark that defines what a staff member is to achieve in a specified year, competencies relate to how the results are actually achieved rather than the "marks" awarded to a staff member. Importantly, the Tribunal observes that there is no provision which required that competencies be defined annually, and, moreover, it may well have been an impracticable exercise for the complainant's 2016 appraisal given that he was transferred during the course of that year. The second plea is unfounded.

11. Regarding the third plea, the complainant's argument to the effect that his 2016 performance assessment was not thoroughly done and was "extremely thin" implicitly invites the Tribunal into the realm of technical considerations regarding appraisal assessments that are not within its purview as recounted in consideration 3 above. As the Tribunal is satisfied that the complainant's reporting and countersigning officers substantiated the markings and the overall performance rating they awarded him in the subject appraisal report, this plea is unfounded.

12. As the record reveals that an annual review meeting, required under Section B(8) of Circular No. 366 for the purpose of facilitating drawing up the appraisal report, was conducted on 3 April 2017, the complainant's submission in his fourth plea that that meeting was not conducted is also unfounded.

13. The complainant also submits in his fourth plea that his 2016 appraisal report was flawed because no intermediate review meeting was conducted under Section B(5)(a) of Circular No. 366. This aspect of the complainant's fourth plea is also unfounded.

This provision relevantly stated that, towards the middle of the appraisal period, the staff member must have at least one formal intermediate review meeting with her or his reporting officer and, where applicable, with her or his co-reporting officer. During that meeting, feedback is to be provided to the staff member on her or his performance since the beginning of the appraisal period, particularly on whether the level of achievement of objectives at that stage is in line with the expectations. A summary of the feedback provided at the intermediate review meeting is to be recorded in the electronic tool but is not part of the final appraisal report. At the meeting, the objectives that were set at the start of the appraisal period may be amended, if needed, and additional objectives may be set. The reporting officer informs the staff member whether her or his performance since the beginning of the appraisal period is such that there are serious doubts that the agreed objectives will be reached by the end of the appraisal period, or whether the level of competencies demonstrated lies below what can reasonably be expected for the function, grade and experience of the staff member, particularly whether she or he is likely to receive an overall assessment which is below what is acceptable.

14. It is apparent to the Tribunal that, inasmuch as the complainant was transferred to Directorate 2843 in May 2016 – that is, towards the middle of the appraisal exercise –, there was no rationale for organising a formal intermediate review meeting as there was no basis upon which the feedback contemplated by Section B(5)(a) of Circular No. 366 could have been provided to him. The Tribunal notes the complainant's

reporting officer's explanation, to which the EPO adverts, that, during the second quarter of 2016, the complainant was adapting to his new functions, whilst he (the reporting officer) closely monitored his (the complainant's) training and knowledge transfer via an electronic tool on a weekly basis. The complainant started engaging in productive activities in the third quarter of that year and only performed autonomously during the fourth quarter of that year.

15. 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 Directorate-General 4 therefore correctly accepted this conclusion in the impugned decision.

16. 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