H. (No. 3)

v.

EPO

137th Session **Judgment No. 4793**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr A. H. against the European Patent Organisation (EPO) on 8 May 2018 and corrected on 13 June, the EPO's reply of 26 September 2018, the complainant's rejoinder of 11 January 2019 and the EPO's surrejoinder of 23 April 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.

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. He works as a patent examiner. In 2004, he started suffering from severe medical problems which resulted in various absences on sick leave. His health condition stabilized in 2007, but from 2008 onwards it deteriorated again, leading to a gradual reduction of his weekly working hours. During the 2016 reporting period, his working hours were initially reduced to 35 hours per week, based on a reintegration plan drawn up by the EPO's Occupational Health Service covering the period from 1 December 2015 to 30 April 2016. However, following the opinion of the Organisation's medical practitioner appointed by the President of the Office, his working time was reduced to 30 hours per week from 21 January to 30 April 2016, to 25 hours per week from 17 May to 30 October 2016 and to 20 hours per week from 1 November to 31 December 2016.

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 13 April 2016, he contested those objectives which, in his view, completely disregarded the complexity of his work, the time available and his state of health. On 20 April, the countersigning officer indicated that the reporting officer had taken all relevant aspects into account, including the Occupational Health Service's reintegration plan, and confirmed the objectives set, which were below those established by the Peer Reference Examiner standards. Indeed, in view of his medical condition, his productivity objectives were fixed at 0.24 instead of 0.31.

During the intermediate review meeting held on 19 July 2016, the complainant was informed by his reporting officer that, even considering his medical condition, his performance was well below the expectations for an examiner of his experience and grade, and that maintaining such a low performance could result in his overall performance being assessed as "not correspond[ing] to the level required for the function" or "unacceptable in relation to the level required for the function".

Following an interview held on 24 March 2017, the complainant received his appraisal report for the period covering 1 January 2016 to 31 December 2016, in which his overall performance was assessed as

"unacceptable in relation to the level required for the function". Disagreeing with the content and the markings contained in his report, the complainant requested that a conciliation procedure be initiated. A meeting took place on 5 May 2017, following which the report was confirmed. On 29 May, he raised an objection with the Appraisals Committee suggesting that the overall marking of his performance be assessed as "acceptable".

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 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 that a new appraisal report be issued "taking full account of [his] [i]nability to perform [his duties] like a reference examiner due to his disability and [setting] objectives under consideration [of] his medical condition, [by reducing] the productivity figures". He also asks the Tribunal to find that Circular No. 366 is inapplicable and that the composition of the Appraisals Committee is unlawful. He claims moral damages, in an amount of at least 10,000 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 on procedural and substantive grounds, the complainant seeks orders which the Tribunal states as follows:

(1) to quash the impugned decision;

(2) to order the EPO to issue a new appraisal report in which his inability to perform his duties (due to his medical condition) is fully taken into account, the productivity objectives are set taking into consideration his medical condition and his working time and required productivity are reduced;

(3) to declare that the composition of the Appraisals Committee is flawed and order the EPO to establish an Appraisals Committee with an equal number of members appointed by the management and by the Staff Committee;

(4) to award him at least 10,000 euros in moral damages for the physical and mental injury he suffered; and

(5) to award him costs.

2. In his rejoinder, the complainant correctly withdrew the claim he initially made in his complaint for an order to set aside Circular No. 366. The Tribunal's case law makes it clear that staff members may only challenge a general decision to the extent that they impugn an individual decision, stemming from that general decision, concerning them (see, for example, Judgment 3494, consideration 4). In any event, the Tribunal has rejected claims to set aside Circular No. 366 made in a number of judgments in which appraisal reports established under it were challenged (see, for example, Judgments 4718, consideration 6, and 4714, considerations 8 and 9).

3. The complainant's request in item (3) is rejected as unfounded as the Tribunal has already upheld the legality of the composition of the Appraisals Committee in a number of judgments (see, for example, Judgments 4713, consideration 9, 4637, consideration 11, and 4257, considerations 12 and 13).

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. [...]
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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."

6. 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.

7. In addition, the complainant seems to link the establishment of his 2016 appraisal report with the promulgation of decision CA/D 2/15, which amended, with effect from 1 April 2015, the provisions relating to sick leave and invalidity. He argues that the said decision abolished the prior invalidity regime causing him injury as it prevents the EPO from fulfilling its social obligations towards staff members, who, like him, suffer medical impairment and that it also

prevents the Organisation from upholding its prior social security scheme with regard to invalidity. The Tribunal rejects this argument as unfounded. There was no relationship between the establishment of the complainant's 2016 appraisal report and decision CA/D 2/15. The complainant's further argument that the reforms which the EPO introduced with effect from 2015 prevents it from fulfilling its social obligations and duty of care towards him and other staff members does not advance his case any further as it is based primarily on his criticism of decision CA/D 2/15. The complainant does not specify any other document or provision for this argument.

8. Regarding the merits, in its opinion, the Appraisals Committee noted that, in his objection, the complainant stated that his productivity had improved from a productivity factor of 0.18 in 2015 to 0.19 in 2016; that his reduced time at work (on account of his medical condition) had not been duly considered in the assessment of his performance; that the productivity factor set in his objectives for the 2016 period was too high for his technical area and in breach of the EPO's duty of care given his medical condition; that the assessment of his competencies was arbitrary as it was not substantiated in the appraisal report; and that there was little evidence that his reporting officer was not satisfied with his productivity rate, which was impacted by both his medical condition and the birth of his child.

9. In rejecting the complainant's objection on the basis that he had not provided any evidence or arguments to prove that the appraisal report was arbitrary or discriminatory, the Appraisals Committee stated that it appeared that, in setting his objectives, the complainant's reporting officer took into consideration all of the factors, which the complainant mentioned in his objection. The Tribunal finds this conclusion supported by the record. The reporting officer stated that those factors were taken into account when the objectives were set and that they were based on the minimum required production for a fully trained examiner taking the said factors, as well as his grade, experience and the general guidance for each, into account. The reporting officer also stated that the productivity rate of 0.19, which the complainant

achieved during the 2016 period was far below what was required by his set objectives. The evidence shows that the complainant was working, at the material time, in the context of a reintegration plan with adjustments which had been suggested by the EPO's Occupational Health Service. This casts further doubt on his arguments that his working hours had been reduced as a result of his medical condition but not his productivity rate, and that the EPO breached its duty of care towards him by adjusting his objectives upwards. The complainant's further argument in his complaint suggesting that the Appraisals Committee erred by not convening a medical committee which would have assisted it to rule on the issue of discrimination against him in the appraisal process because of his medical condition is also rejected as that submission has no legal basis. It is also evident from his reporting and countersigning officers' comments in the subject appraisal report that his competencies were substantiated.

10. 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.

11. 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