

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

P.
v.
EPO

137th Session

Judgment No. 4794

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L. M. A. P. against the European Patent Organisation (EPO) on 19 March 2018 and corrected on 21 April, the EPO's reply of 14 August 2018, the complainant's rejoinder of 18 October 2018, corrected on 5 November, and the EPO's surrejoinder of 18 February 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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, a permanent employee of the European Patent Office, the EPO's secretariat, since 2004, holding a post of patent examiner, acted as a staff representative from 1 January to 30 September 2016 for 50 per cent of his normal working hours. On 1 July 2016, in his intermediate review meeting for the year in progress, he was informed that his performance was far below his objectives and abilities and that an improvement was urgently required. After attending a review meeting on 28 February 2017, he received his appraisal report for the period from 1 January to 31 December 2016, which recorded an overall performance assessment score of 5 (on a scale of 1 to 8) indicating that his performance, which had significantly improved, had been assessed as "corresponding to the level required for the function". The complainant expressed his disagreement with the report and requested an overall score of 3, meaning that his performance should be regarded as "significantly higher than the level required".

In accordance with section B(11) of Circular No. 366, a conciliation meeting took place on 27 March 2017 between the complainant, the reporting officer and the countersigning officer. Following that meeting, a new appraisal report was drawn up in which the reporting officer's comments in the sections headed "quality" and "global comments on achievement of objectives" were amended, although the overall score remained the same.

On 4 May 2017 the complainant expressed his disagreement with the new version of the report and, that same day, raised an objection with the Appraisals Committee.

In its opinion of 11 October 2017, the Appraisals Committee found that the assessment of the complainant's performance was neither arbitrary nor discriminatory but recommended that the report be referred back to the reporting officer and the countersigning officer so that the wording of the comments could be reviewed to ensure that they took account only of the complainant's activities as an examiner and not as a staff representative. By a letter dated 8 December 2017, the Vice-President of Directorate-General 4 (DG4) informed the complainant of his decision to follow those recommendations. That is the impugned decision.

Following that decision, the reporting officer amended the disputed appraisal report by deleting the comments which referred to the staff representation activities.

In his complaint, the complainant asks the Tribunal to set aside the “corrections imposed” on his appraisal report for 2016 on the basis of the Appraisals Committee’s recommendation to that effect, to award him an overall performance assessment score of 3 or, failing that, to review the evaluation of his performance. He also asks to be granted a promotion for 2016 and four step increases for 2014 and 2015 and seeks compensation for the material and moral injury he alleges he has suffered, together with an award of costs.

The EPO considers that the claim for the award of an overall performance assessment score of 3 is irreceivable because it is not within the Tribunal’s competence to issue injunctions. The same applies, in its view, to the request for a promotion, which amounts to an attempt to broaden the scope of the dispute and which, in any event, has become moot since the complainant was promoted in 2018. As regards the claim for damages, the Organisation asserts that no harm has been established but that, if the Tribunal were to decide to set aside the appraisal report, the alleged injury would thereby be sufficiently redressed. The EPO therefore requests that the complaint be dismissed as partly irreceivable and entirely unfounded.

CONSIDERATIONS

1. The complainant seeks the setting aside of the decision of the Vice-President of Directorate-General 4 (DG4) dated 8 December 2017 concerning his appraisal report for 2016. By that decision, the Vice-President dismissed the objection raised by the complainant in relation to that report, endorsing the unanimous recommendations of the Appraisals Committee in its opinion of 11 October 2017.

According to that decision and that opinion, the complainant’s appraisal report for 2016 was neither arbitrary nor discriminatory. The Committee’s recommendation that the report be reviewed to remove any reference to the work carried out by the complainant as a staff

representative was endorsed by the Vice-President, following which the Organisation made the necessary corrections.

The complainant, who remains dissatisfied, essentially asks the Tribunal to reinstate the wording contained in his initial appraisal report in relation to his work as a staff representative and to order that he be awarded a higher score and given a promotion for 2016, together with four step increases for 2014 and 2015. He also seeks compensation for the material and moral injury he considers he has suffered and the award of costs.

2. The complainant requests oral proceedings. However, the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow the Tribunal to be properly informed of their arguments and the relevant evidence. The request for oral proceedings is therefore dismissed.

3. With regard to appraisal reports for permanent employees such as the complainant, Article 47a of the EPO Service Regulations provides the following:

- “(1) The assessment of performance and competencies is a managerial responsibility. It shall be conducted in a fair and objective manner.
- (2) The ability, efficiency and conduct in the service of each employee, with the exception of the President and vice-presidents, shall be the subject of an appraisal report made at least once a year under the conditions established by the appointing authority.
- (3) The appraisal report shall be communicated to the employee concerned who shall be entitled to make any comments thereon which he considers relevant.”

Article 110(2) of the Service Regulations, in the version applicable at the material time, also provides the following in respect of the internal appeal procedure for appraisal reports:

“The following decisions are excluded from the internal appeal procedure:

[...]

- (e) appraisal reports referred to in Article 47a.”

This article is supplemented by Article 110a of the Service Regulations, which, in particular, provides the following in respect of the objection procedure for appraisal reports:

- “(1) In case of disagreement on an appraisal report referred to in Article 47a, the parties to the dispute shall endeavour to settle it through conciliation.
- (2) If at the outcome of the conciliation, an employee is still dissatisfied with his appraisal report, he may challenge it by raising an objection with the Appraisals Committee.
- (3) The President of the Office shall appoint the chairman of the Appraisals Committee, his deputy and 15 employees in active employment at the beginning of each year. From among this list of 15 employees, the chairman or his deputy will choose three members for each session.
- (4) The Appraisals Committee shall review whether the appraisal report was arbitrary or discriminatory.
- (5) The competent authority shall take a final decision on the objection, having due regard to the assessment of the Appraisals Committee.
- (6) The President of the Office may lay down further terms and conditions for the settlement of disputes regarding appraisals reports.”

4. The complainant’s appraisal report for 2016 was drawn up in compliance with the provisions of Circular No. 366 regarding, *inter alia*, the procedures for conciliation and objection. By Administrative Council decision of 11 December 2014 (CA/D 10/14), the EPO introduced a new career system with effect from 1 January 2015. In particular, that decision inserted new Articles 47a and 110a, referred to above, into the Service Regulations so as to amend the conciliation procedure and establish an objection procedure before an appraisals committee. At the same time, Article 109(3) and Article 110(2) of the Service Regulations were amended to exclude appraisal reports from the review and internal appeal procedures.

5. Section B(11) of Circular No. 366 sets out the details of the new conciliation procedure, while sections B(12) and B(13) describe the objection procedure before the Appraisals Committee. These provisions state the following:

“B. PERFORMANCE MANAGEMENT CYCLE

[...]

(11) Conciliation

As soon as possible after notification that the staff member is not in agreement with the report, the countersigning officer must plan a conciliation meeting with the staff member and the reporting officer in order to reach agreement.

At the end of the conciliation procedure, the report is either amended or confirmed. The reporting officer forwards the final version of the appraisal report to the staff member, if applicable after implementation of the agreed changes and final validation by the countersigning officer.

The outcome of the conciliation is summarised by the countersigning officer and communicated to the staff member and the reporting officer.

In case of failure by the staff member to attend the conciliation meeting, the reporting and countersigning officers may proceed in the staff member's absence.

The whole process, from notification that the staff member is not in agreement with the report to the return of the appraisal report to the staff member, possibly after amendment, may not exceed [twenty] working days.

Should the staff member not receive the appraisal report back within this time frame, he may consider the lack of reply as a refusal to amend the appraisal report.

(12) Objections with the Appraisals Committee

If, after receiving the appraisal report following conciliation with the reporting and countersigning officers or after the time limit mentioned in the previous section has expired, the staff member

- (a) does not wish to pursue the matter, he must confirm this and send the report to [the Principal Directorate Human Resources].
- b) is still dissatisfied with his appraisal report and wishes to pursue the matter, he must within ten working days request that the matter be taken further by raising an objection with the Appraisals Committee via the electronic tool, stating in writing the grounds for the objection and the relief claimed. The appraisal report, together with the summary of the outcome of the conciliation procedure, is then sent via the reporting officer to [the Principal Directorate Human Resources], which forwards it to the Appraisals Committee.

If the staff member does not respond within the above time limit, the report will be deemed complete. [The Principal Directorate Human Resources] will then close the procedure.

(13) Objection procedure

- (1) The procedure before the Appraisals Committee is a written procedure, unless otherwise decided by the Committee.
- (2) The Appraisals Committee examines the objections and reviews whether the appraisal report was arbitrary or discriminatory.
- (3) The assessment of the Appraisals Committee is submitted to the competent authority for a final decision on the objection.
- (4) The final decision taken is forwarded to the staff member, the reporting officer and the countersigning officer, together with the assessment of the Appraisals Committee.
- (5) If the decision is to confirm the report, it will be deemed final and will be filed in the personal file by [the Principal Directorate Human Resources].
- (6) If the decision is to amend the report, the reporting officer will be responsible for implementing the decision in the electronic tool and communicating the report to the staff member after validation by the countersigning officer. The staff member must acknowledge receipt of the amended report within fifteen working days and return it to [the Principal Directorate Human Resources], for filing in his personal file.”

6. The complainant submits first of all that the procedure followed in relation to his appraisal report for 2016 was irregular and unlawful because the Appraisals Committee is not a truly independent body, that appeals to the Internal Appeals Committee are now abolished and that the power to review appraisal reports is now limited.

7. However, in Judgment 4257, considerations 12 and 13, the Tribunal already rejected arguments similar to the complainant’s contention that the conciliation and objection procedures provided for in Article 110a of the Service Regulations and Circular No. 366 were rendered unlawful by the constitution of the Appraisals Committee, in particular by stating the following:

“12. [One of the complainant’s arguments] is that the new scheme does not provide an impartial review of the staff report which includes, ultimately, review by an appeals committee with management and staff representatives in equivalent numbers. In substance, two issues emerge from this argument. The first is that the Appraisals Committee is, under the new regulatory framework, limited to considering whether the staff report was arbitrary or

discriminatory. The second is that the grievance cannot be further pursued by way of internal appeal. As to this second point, the Tribunal has repeatedly spoken of the desirability of effective internal appeal mechanisms (see Judgment 3732, consideration 2, and the cases cited therein). However the Tribunal has not said it is mandatory and a precondition to the exercise of jurisdiction by the Tribunal in relation to final decisions that all such decisions are subject to internal appeal.

13. As to the complainant's argument about the limited role of the Appraisals Committee, it is not self-evidently a flaw in the framework. As the Tribunal has said in relation to its own role, the assessment of an employee's merit during a specified period involves a value judgement (see, for example, Judgment 3692 referred to earlier). By parity of reasoning, it would be reasonable for an organisation to adopt an approach that individuals (such as those comprising the Appraisals Committee) reviewing a staff report prepared by a staff member's supervisor involving value judgements would not be as well-placed to make the same value judgements but, in order to guard against abuses of the process, would have authority to assess whether the report was arbitrary or discriminatory. And while staff would understandably prefer the membership of the Appraisals Committee to include staff representation and not be limited to management, the fact that it is so limited does not render its constitution in this way, unlawful."

8. This case law was recently confirmed in Judgments 4638, consideration 8, and 4637, consideration 11, and the Tribunal sees no reason to depart from its previous assessment of the lawfulness of the constitution of the Appraisals Committee. As Article 47a of the Service Regulations provides, the assessment of performance and competencies is a managerial responsibility, and the constitution of the Appraisals Committee is appropriate in view of its purpose.

The Tribunal adds that, contrary to what the complainant appears to be alleging, the conciliation procedure set out in section B(11) of Circular No. 366 is not unlawful simply because it does not provide for an independent mediator to be present during the conciliation meeting. There is a presumption of the good faith of reporting officers, and the lack of a mediator does not in itself render the process biased (see the aforementioned Judgment 4637, consideration 14).

9. As for the complainant's contention that the objection procedure before the Appraisals Committee set out in Circular No. 366 does not offer the same safeguards as the internal appeal procedure before the Appeals Committee, the complainant has not put forward any arguments showing the objection procedure to be flawed. The Tribunal recalls that respect for the adversarial principle and the right to be heard requires that the official concerned be afforded the opportunity to comment on all relevant issues relating to the contested decision (see, for example, the aforementioned Judgment 4637, consideration 12, and Judgments 4408, consideration 4, and 2598, consideration 6). In the present case, the complainant had the opportunity to submit his observations at several points during the conciliation procedure and in the objection he submitted to the Appraisals Committee.

10. Lastly, the fact that the Appraisals Committee's mandate is confined to determining whether an appraisal report is arbitrary or discriminatory does not in itself render the procedure flawed, as the Tribunal also noted in the aforementioned Judgments 4637, consideration 13, and 4257, consideration 13. In addition, the Appraisals Committee's restricted mandate in this regard does not limit the extent of the Tribunal's judicial role in this area. It must be recalled that the Tribunal can exercise only a limited power of review in the matter of staff appraisals. In Judgment 4564, consideration 3, the Tribunal reiterated the following in this regard:

“[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. Regarding the rating of EPO employees, those criteria are the more stringent because the Office has a procedure for conciliation on staff

reports and the Service Regulations entitle officials to appeal to a [...] body [...]"

Since the Tribunal does not have the ability to substitute its own assessment for that made by the persons or bodies responsible for assessing an employee's merits, the fact that the Appraisals Committee's power of review is itself confined to assessing whether an appraisal report is arbitrary or discriminatory does not affect the Tribunal's power of review, which continues to be exercised on the same terms as previously.

11. It follows that the complainant's various pleas regarding the lawfulness of Circular No. 366 and the procedure followed in compliance with that circular must be dismissed on the same grounds as those already set out in considerations 11 to 14 of the aforementioned Judgment 4637.

12. Furthermore, aside from the fact that the Organisation has responded to the complainant's criticisms factually, precisely and clearly in its submissions, the exercise that the complainant is asking the Tribunal to undertake with regard to the assessment of his productivity and his overall evaluation amounts in reality to a re-evaluation of his performance for 2016. However, that is a misconstruction of the Tribunal's role, given the limited power of review the Tribunal may exercise in this matter according to its settled case law (see, for example, the aforementioned Judgment 4564, consideration 3, which was cited in the aforementioned Judgment 4637, consideration 13).

13. In that regard, the Tribunal notes, in the first place, that the complainant has no basis for claiming that the corrections made by the Organisation to his appraisal report for 2016 following the recommendation of the Appraisals Committee, which was followed by the Vice-President of DG4 in the impugned decision, should be set aside. In Judgment 4718, consideration 15, the Tribunal, referring to Judgments 4281, consideration 7, and 3666, consideration 8, considered that, unless the applicable rules state otherwise, an organisation which

restricts the appraisal of an official's performance to the work she or he has done as a member of staff and excludes any work devoted to staff representative duties is not in breach of its obligations in this area. From this perspective, it was therefore appropriate, as recommended by the Appraisals Committee, to correct the reference made by the reporting officer to the complainant's work in 2016 as a staff representative since, in fact, the appraisal should not have taken that work into account.

In addition, the allegations of discrimination and institutional harassment made by the complainant in his capacity as staff representative were analysed and rejected by the Appraisals Committee, and the complainant has failed to convincingly demonstrate why the Committee's findings in this respect should be regarded as unfounded.

14. In the second place, the complainant's claim for the Tribunal to order that he be awarded an overall performance assessment score for 2016 of 3, rather than 5, must be rejected. It is settled case law that the Tribunal does not, in any event, issue injunctions of that kind (see, for example, the aforementioned Judgment 4718, consideration 7).

15. In the third place, the complainant's claims that he should be awarded a promotion for 2016 and four step increases for 2014 and 2015 must be found irreceivable since they fall far beyond the scope of the dispute, which concerns his appraisal report for 2016. In Judgment 4726, consideration 7, the Tribunal stated, in a similar case involving the EPO, that the denial of a promotion – which, in the present case, was notified to the complainant on 12 December 2017 in a separate decision which post-dated the impugned decision – constitutes a separate decision from the decision concerning an official's appraisal report, even if it is based directly or indirectly on that report, and must therefore be challenged through a separate internal appeal procedure.

16. Lastly, the complainant's claims for compensation for the moral injury he allegedly suffered as a result of an "abuse of discretionary authority", discrimination due to his role as staff representative and harassment will not be granted. As the complainant's pleas based on these three grievances are unfounded, the claims for compensation for

injury allegedly suffered as a result thereof must therefore also be rejected.

17. As regards the time taken to finalise his appraisal report for 2016, which the complainant considers so excessive as to render the process “inequitable”, the Tribunal notes that the aforementioned relevant provisions of the Service Regulations do not prescribe any particular time frame for dealing with claims made by an official. Furthermore, while it is true that the procedures for conciliation and objection under Circular No. 366 assume that matters will be dealt with swiftly and that, from that perspective, a period of more than eight months between the first objection voiced by the complainant, which gave rise to a conciliation meeting, and the impugned decision of the Vice-President of DG4 could certainly appear excessive in the circumstances of the case, the complainant has not provided any evidence of any injury caused by this delay. It is therefore not appropriate to award the complainant compensation under this head.

18. It follows from the foregoing that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 13 November 2023, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, 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.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

MIRKA DREGER