K. (No. 35)

v.

EPO

138th Session **Judgment No. 4893**

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirty-fifth complaint filed by Mr A. C. K. against the European Patent Organisation (EPO) on 3 February 2017 and corrected on 13 February, the EPO's reply of 29 May 2017, the complainant's rejoinder of 17 March 2018 and the EPO's surrejoinder of 25 June 2018;

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 staff report for 2008-2009.

Before 2015, the regulatory framework within the EPO for creating and reviewing staff reports was embodied in Circular No. 246, entitled "General Guidelines on Reporting". If a staff member was not in agreement with the content of her or his report, Section D facilitated a conciliation procedure between her or him and her or his reporting and countersigning officers, under the direction of a mediator appointed by the President of the European Patent Office, the EPO's secretariat. If no agreement was reached at the end of the mediation procedure, Section D(7) permitted the staff member to pursue the matter before the Internal Appeals Committee in accordance with Articles 107 and 108 of the Service Regulations for permanent employees of the Office.

Circular No. 246 was replaced with effect from 1 January 2015 by Circular No. 366, entitled "General Guidelines on Performance Management". 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 an Appraisals Committee replacing the internal appeal procedure before the Internal Appeals Committee.

The complainant joined the European Patent Office in 1990 as an examiner. At the material time, he held grade A4(2).

On 16 March 2010, his reporting officer signed his staff report for the period from 1 January 2008 to 31 December 2009. His quality, aptitude, attitude and the overall rating were rated as "outstanding", whereas his productivity was rated as "very good". The countersigning officer agreed with the markings and signed the report on 18 March. On 2 June 2010, the complainant attached written comments to his report, objecting, among other things, to the downgrading in the marking given under productivity. On 14 June, the reporting officer explained to the complainant that his productivity marking was based on a "comparative evaluation of productivity levels within the directorate" and informed him that there was no reason to amend his marking. On 15 June, the countersigning officer signed the report without further comments. On 30 July 2010, the complainant indicated that he wished to pursue the matter according to the conciliation procedure set out in Section D of Circular No. 246.

From 25 October 2010 to 30 June 2012, the complainant was on sick leave. With effect from 1 July 2012, he was placed on invalidity.

A conciliation meeting took place on 11 January 2012 and an agreement was reached for the amendment of the comment under the productivity box. A first version of the agreed conciliation report was submitted to the complainant for signature on the same day. However, it was not signed by the complainant, nor did he send it back to the Office.

On 23 October 2015, the complainant enquired about the finalisation of his staff report. On 17 December 2015, Department 4343 (Performance Management) sent him anew the conciliation report

referring to the agreement reached on 11 January 2012. He was informed that he had 15 days to indicate whether he agreed with the conciliation report, and that the final decision concerning his staff report would be taken by the Vice-President of Directorate-General 4 (DG4). He was also advised that any further steps regarding his report would be addressed under Circular No. 366.

On 28 December 2015, the complainant wrote to the President indicating that he disagreed with the conciliation report and requesting that his marking under the productivity box be replaced by "outstanding".

On 17 May 2016, he inquired once again about the finalisation of his staff report.

As the complainant did not accept the outcome of the conciliation meeting, a new conciliation report, indicating that no agreement had been reached, was issued on 8 July 2016 and submitted to the complainant on 26 July. It was then submitted to the President, who, on 8 September 2016, decided that the staff report would remain unchanged.

On 16 September 2016, the complainant criticized the conciliation report of 8 July. On 24 October 2016, he received a copy of the final version of the staff report, with which he disagreed and enquired about the objection procedure with the Appraisals Committee.

On 9 November 2016, the complainant raised an objection with the Appraisals Committee reiterating his disagreement with the final marking of his productivity, which he considered to have been downgraded in comparison to his previous staff report for 2006-2007. He also contended that the conciliation report had been submitted to him within an unreasonable delay. He requested that the marking under the productivity box be amended, that he be given an opportunity to sign the original version of his staff report and that he be awarded moral damages and costs. Procedurally, he asked to be informed of the composition of the Appraisals Committee, to be handed a copy of the Rules of Procedure, to have a hearing before the Committee and to have an accelerated procedure. On 21 November 2016, he received a list of the Committee's members and was informed that the original staff report had not been finalized yet.

In its opinion of 19 December 2016, the Appraisals Committee recommended rejecting the complainant's objection and confirming the staff report which, in its view, was neither arbitrary nor discriminatory. It concluded that the complainant's arguments reflected more a relative and subjective divergence of views rather than an actual flaw in the assessment.

By a letter dated 18 January 2017, the complainant was informed that the Vice-President of DG4 had decided to follow the Appraisals Committee's recommendation. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, as well as "all general decisions underlying [this] individual decision" or, subsidiarily, to order that these general decisions be no longer applied and that the EPO apply the previous wording of the Service Regulations. He further requests that the text and the marking under the productivity box of his staff report be amended, that he be given the possibility to sign the original staff report and that he be awarded moral damages under different headings. He further seeks an order for the EPO "to allow [the] filing of a partiality objection before deciding on an internal appeal, whereby the partiality objection should be examined in an internal appellate body sitting in lawful composition". Finally, he asks to be granted costs for the internal appeal procedure and for the present proceedings and payment of compound interest on all amounts due.

Subsidiarily, he requests that the case be sent back to the EPO so that the internal appeal is treated by an internal appellate body having a balanced composition and that the Rules of Procedure of the Appeals Committee of 1 July 2014 and the underlying general decisions be set aside and, auxiliary, that they no longer be applied.

The EPO contends that the complaint is moot as the complainant is no longer an active employee. It further alleges that most of the complainant's claims are either irreceivable or irrelevant and defines the scope of the dispute as being limited to the question of whether the complainant's productivity should have been graded "outstanding" instead of "very good". Consequently, the EPO requests the Tribunal to dismiss the complaint as irreceivable and unfounded in its entirety.

In his rejoinder, the complainant withdraws his claim that the case be sent back to the Organisation, as well as a specific claim for moral damages, and makes a request for additional moral damages under new headings.

CONSIDERATIONS

1. The complainant applies for oral proceedings. The parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. The request for oral proceedings is, therefore, rejected.

2. The complainant was a member of the staff of the EPO from 1990 to 31 December 2015. He was on sick leave from 25 October 2010 until 30 June 2012 and on invalidity from 1 July 2012. The detailed factual background is already set out earlier in this judgment. Suffice it to note that the genesis of this grievance was a staff report prepared for the calendar years 2008-2009. The report, as initially prepared by the reporting officer, evaluated the complainant's quality, aptitude, attitude and the overall rating as "outstanding" though his productivity only as "very good". The complainant was not satisfied with this last-mentioned evaluation and has persisted both internally and before the Tribunal with a contention that his productivity should have been evaluated as "outstanding".

3. He filed his complaint with the Tribunal on 3 February 2017. One of the arguments advanced by the EPO is that this complaint is irreceivable as it is moot particularly given that the complainant has long since ceased being a member of its staff. It might also be thought that, when he ceased being a member of staff, he no longer had a cause of action. There is, in the Tribunal's case law, some support for the view that a former staff member, who has retired since a contested staff report was drawn up, has "a moral interest in challenging a report appraising her or his performance" and has a cause of action which endures beyond retirement (see Judgment 4637, consideration 7). To what extent, if at all, the Tribunal's Statute confers jurisdiction on the Tribunal to

vindicate moral, as opposed to legal, rights need not be addressed in this judgment. That is because the complaint should be dismissed.

4. It is convenient to focus on the relief the complainant seeks. In his rejoinder, he indicates he would not pursue some of the claims advanced in his brief. His primary relief, as articulated in the rejoinder, is that the Tribunal "take a final decision on the merits". The Tribunal takes this to include a reference to a claim made in the complaint form under the heading "[r]elief claimed", that "the text [under] productivity in [the complainant's] staff report [for] 2008-2009 should be amended by replacing the words ['very good'] by ['outstanding'], and the box marking should be amended correspondingly". In fact, the words just quoted from the complaint form, "very good" and "outstanding", are on the form in German (though the remainder is in English) and are *"sehr gut"* and *"ausgezeichnet"* respectively.

5. However, it has long been acknowledged that a request such as this would involve an impermissible determination by the Tribunal of what the appraisal should be (see, recently, Judgment 4786, consideration 1). The Tribunal noted in Judgment 4786 that it can, if the report was the product of one of the legal flaws listed in Judgment 4564, consideration 3, set aside the contested staff report at the same time as the impugned decision and remit the matter to the Organisation for review. However, the complainant now eschews any desire to have the matter remitted. Accordingly, what remains is the impermissible request to the Tribunal to undertake the evaluation itself. This claim must be rejected.

6. To the extent that the complainant persists with a claim (which is entirely unclear) that the applicable procedures for internal review of challenged staff reports were unlawful, it has no practical relevance if there is no remittal of the complainant's challenge to his report, as just discussed. One conceivable qualification to this general comment would be if moral damages might be awarded. This is a topic to which the Tribunal now turns.

7. In the claims in his brief, the complainant expressly seeks moral damages on a multiplicity of bases. Only one is expressly withdrawn in the rejoinder, namely a claim for 10,000 euros for the loss of the original staff report during his long-term absence. On the assumption that the residue continues to be pursued by the complainant, he claims, firstly, 10,000 euros for the internal appellate body making its recommendation without granting him the right to be heard in oral proceedings, secondly, 5,000 euros for replacing the Internal Appeals Committee, comprising two members nominated by the Central Staff Committee, by the Appraisals Committee, whose members were exclusively nominated by the President of the Office, thirdly, 5,000 euros for letting Mr F. sit on the Appraisals Committee, although he was involved in a harassment procedure concerning the complainant, fourthly, 2,000 euros for the internal appellate body failing to communicate its composition in a timely way and, lastly, 8,000 euros for undue delay in the internal appeal procedure. The complainant also seeks costs.

8. More recent case law of the Tribunal makes it clear that moral damages are not awarded when not substantiated. Moral damages arise from moral injury. It is necessary for a complainant to establish evidence of the injury suffered, of the alleged unlawful act adversely affecting her or him, and of the causal link between the unlawful act and the injury (see Judgments 4637, consideration 19, 4158, consideration 7, 4157, consideration 9, and 4156, considerations 5 and 6). In the present case, the complainant does not demonstrate with persuasive evidence that any of the events for which he expressly or impliedly seeks moral damages caused him moral injury, let alone demonstrates a causal link between the alleged unlawful act adversely affecting him and the damage suffered. Accordingly, his various claims for moral damages must be rejected.

9. In the result, the complainant’s claims in their totality are unfounded. The complaint should be dismissed, and no occasion arises to make an order for costs in the complainant’s favour.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 23 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER