

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

D. (No. 8)

v.

EPO

135th Session

Judgment No. 4638

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Mr A. D. against the European Patent Organisation (EPO) on 1 October 2016 and corrected on 5 December 2016, the EPO's reply of 20 March 2017, the complainant's rejoinder of 1 August 2017, corrected on 12 August, and the EPO's surrejoinder of 22 November 2017;

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 2015.

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". The supersession of the former circular by the latter circular coincided with the introduction of a new career system in the EPO by decision of the Administrative Council of 11 December 2014 (CA/D 10/14), effective 1 January 2015.

On 15 July 2015 the complainant – a permanent employee of the European Patent Office, the EPO’s secretariat, holding the post of examiner since 1981 – was informed in his intermediate review meeting for the current year that his performance was far below the objectives set and what was expected of him. He was offered supportive measures. After taking part in a prior interview on 29 February 2016, the complainant received his appraisal report for 2015 signed by the reporting officer and the countersigning officer on 11 March 2015. The overall performance rating reflected a “clearly unacceptable performance”. The complainant did not submit any comments.

On 8 April the countersigning officer invited him to a conciliation meeting in order to discuss the content of the report. The complainant asked permission to be accompanied by a lawyer, which was refused. On 12 April, at the complainant’s request, his director sent him the detailed calculation of his productivity resulting from the system for assessing examiners’ productivity (known by the acronym “PAX”), which the complainant disputed.

The conciliation meeting took place on 13 April 2016 but as the parties concerned did not reach an agreement, the appraisal report was left unchanged. The matter was referred to the Appraisals Committee on 29 April 2016. In its opinion of 24 June 2016, the Committee recommended that the complainant’s objection be rejected and that his appraisal report for 2015, which, in its view, was neither arbitrary nor discriminatory, be confirmed. By a letter of 8 July 2016, which constitutes the impugned decision, the Vice-President of Directorate-General 4 (DG4) informed the complainant of his decision to follow those recommendations.

The complainant asks the Tribunal to set aside the impugned decision as well as the opinion of the Appraisals Committee, and to declare, first, that the PAX calculation rules were incorrectly applied when assessing his productivity and, second, that the 2015 appraisal exercise was arbitrary, discriminatory and flawed. He also requests that his appraisal report for 2015 be set aside and withdrawn from his personal file, that a new report be drawn up by impartial reporting officers, and that he be awarded compensation for the moral injury he submits he has suffered, which includes the alleged affront to his dignity caused by the premature

sending of inaccurate personal data to a disciplinary committee that was dealing with a different case, and costs in the amount of 2,000 euros. Lastly he asks that his reporting officers' conduct be declared unacceptable since he considers that he was subjected to threats and blackmail during the appraisal exercise.

The EPO argues that the complainant's cause of action lapsed when he retired on 1 September 2016. Furthermore, it contends that the request for the Appraisals Committee's opinion to be set aside is irreceivable as that opinion is a non-binding recommendation and not a final decision. The same applies, in its view, to the request for a new appraisal report to be drawn up for 2015, which the Tribunal cannot grant as it is not the Tribunal's role to issue injunctions. In respect of the claim for compensation, the Organisation submits that no moral injury has been established but, if the Tribunal were to decide to set aside the appraisal report, the alleged injury would be sufficiently redressed. In respect of the alleged affront to the complainant's dignity, the EPO states that the aforementioned disciplinary procedure is the subject of other complaints and the complainant cannot extend the scope of his present complaint. In consequence, the EPO requests that the complaint be dismissed as irreceivable and subsidiarily as unfounded.

In his rejoinder, the complainant asks the Tribunal not to refer the case back to the EPO but to rule itself on the complaint on the basis of the documents in the file and oral proceedings. If the case is referred back, he asks that a short and reasonable time limit be set for the final settlement of the case, that new reporting officers be appointed to draw up a new appraisal report, that he be allowed assistance throughout the new procedure and that he receive compensation for the moral injury allegedly suffered.

In its surrejoinder, the EPO reiterates that it is not for the Tribunal to issue injunctions.

CONSIDERATIONS

1. In his eighth complaint, the complainant seeks the setting aside of the decision taken by the Vice-President of DG4 on 8 July 2016 and the opinion of the Appraisals Committee issued on 24 June 2016 to which that decision refers. In that decision, the EPO rejected the complainant's objections to his 2015 appraisal report and endorsed the Appraisals Committee's recommendations. In the complaint form, the complainant lists 12 more specific claims, which he puts in the following terms:

- “1.- set aside the final decision of the Vice-President [of] DG4 dated 8 July 2016;
- 2.- set aside the opinion of the Appraisals Committee dated 24 June 2016;
- 3.- declare that the PAX calculation rules were incorrectly applied when assessing productivity;
- 4.- declare that the 2015 [appraisal] exercise was arbitrary, discriminatory and tainted with errors and flaws;
- 5.- set aside the 2015 [appraisal] report and order that this report be withdrawn from [his] personal file;
- 6.- recognise the presumption of bias and the disqualification of the reporting officers and the Appraisals Committee;
- 7.- order that a new [appraisal] report [for] 2015 be drawn up with new, impartial reporting officers;
- 8.- declare any threats or blackmail by superiors in [an appraisal] exercise to be unacceptable;
- 9.- grant [him] compensation in redress for the serious moral injury suffered owing to intimidation, threats, and bias by all superiors, in an amount equivalent to [two] months of basic salary at grade G13/05, net of internal taxes, with interest at the statutory rate[;]
- 10.- grant [him] compensation in redress for the serious injury to [his] dignity caused by the premature sending of unverified, inaccurate data to a disciplinary committee with the intention of increasing a disciplinary measure, in an amount equivalent to [two] months of basic salary at grade G13/05, net of internal taxes, with interest at the statutory rate[;]
- 11.- award [him] 2,000 [e]uros in costs;
- 12.- hold oral proceedings pursuant to [Article 12, paragraph 1,] of the Rules of the Tribunal.”

2. The complainant's eighth complaint, which concerns his 2015 appraisal report, bears several similarities to his sixth complaint, which concerns his 2014 staff report. Despite the relationship between a number of relevant aspects of these two cases, it is appropriate to deliver two separate judgments and not to join the cases, which, moreover, neither the complainant nor the EPO has requested.

In this respect, the Tribunal notes at the outset two important distinctions in the complainant's claims. First, the eighth claim in the complainant's sixth complaint seeking a declaration of the unlawfulness of the supposedly retroactive application of Circular No. 366 is not among the claims contained in his eighth complaint since the present case concerns an appraisal for a period postdating the entry into force of that circular. Second, the claim which he adds in the tenth point of his eighth complaint is not among the claims set out in his sixth complaint.

3. The complainant requests that oral proceedings be held. 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. That application is therefore dismissed.

4. Since the relevant provisions applicable to the complainant's eighth complaint are the same as those cited in Judgment 4637, also delivered in public this day on the complainant's sixth complaint, the Tribunal refers to considerations 2 and 3 of that judgment where all those provisions can be found, without their reproduction herein.

5. The claims seeking the setting aside of the opinion of the Appraisals Committee and the issuance of injunctions, general declarations and declarations of law must be dismissed on the same grounds as those set out in considerations 5 and 6 of aforementioned Judgment 4637.

6. As regards the other claims set out in complainant's eighth complaint, the EPO adds that the tenth claim must be dismissed as the complainant may not extend the scope of the dispute in his complaint. That claim seeks compensation for injury linked to a disciplinary

procedure postdating the 2015 appraisal report, in which the Appraisals Committee was obviously not involved.

The Tribunal observes in this regard that, in his rejoinder, the complainant states that he believes that “the [appraisal] reports were drawn up [...] to force [him] to take early retirement” but, first, the procedure before the Appraisals Committee and the decision impugned in this case concern solely the 2015 appraisal report and, second, the submissions and other evidence in the file do not show that the complainant initiated an internal appeal procedure in respect of his retirement.

Similarly, in support of his tenth claim, the complainant submits that the reporting officer unlawfully sent certain figures to a disciplinary committee with the “clearly premeditated intention” of increasing the penalties that form the subject of his fifth and ninth complaints, leading to Judgments 4114 and 4115. However, the complainant’s two complaints in these cases themselves contained claims for moral damages, which the Tribunal dismissed in those judgments.

Moreover, the complainant states that his primary interest in bringing proceedings is above all warranted by the threats, blackmail and serious harm to his dignity and health that accompanied all the procedures and stages in his 2015 appraisal. The complainant elaborates in detail on the relevant grievances in the “Threats and Harassment” section of his rejoinder and accuses the Organisation of having failed to apply its policy on the resolution of conflicts and the prevention of harassment set out in Circular No. 341. However, there is nothing in the file to show that the complainant submitted an internal complaint or claim under the provisions of that policy with the result that, on this point, he has patently not exhausted the internal remedies.

Given that the complainant cannot expand the scope of his objection before the Appraisals Committee in his complaint before the Tribunal (see, for example, Judgments 3380, consideration 6, and 3222, consideration 11) or submit the same matter for decision in more than one proceeding (see Judgment 3146, consideration 11), the complainant’s tenth claim must be dismissed as irreceivable.

7. Furthermore, the EPO's objection to receivability on the grounds that the complainant has no cause of action owing to his retirement on 1 September 2016 must be dismissed for the same reasons as those set out in consideration 7 of aforementioned Judgment 4637.

8. As regards the complainant's criticisms and submissions concerning the lawfulness of Circular No. 366, these must be dismissed for the same reasons as those set out in considerations 11 to 14 of aforementioned Judgment 4637.

9. The complainant puts forward numerous arguments in support of his contention that the 2015 appraisal report was flawed, arbitrary, discriminatory and unlawful, which can be grouped as follows:

- (i) the flawed nature, in his view, of the report owing to the "insurmountable, improbable and unattainable" productivity targets set, use of incomplete, inaccurate and incorrectly applied data, counting and calculation mistakes in the assessments, and the unlawful or incorrect application of the PAX calculation rules;
- (ii) his suspicions that the reporting officers and the Chairwoman of the Appraisals Committee were biased and their presumed prejudice; and
- (iii) the threats and harassment to which he was subjected throughout the 2015 appraisal process.

10. To begin with, the Tribunal observes that the complainant requests it to declare irreceivable and discount one of the annexes provided by the EPO in its reply, namely the annex containing the statements of the two reporting officers concerning the conciliation procedure for the complainant's 2014 staff report and performance assessment, on the grounds that this annex was not made available to him in sufficient time. However, since the complainant was able to submit observations on that annex in his rejoinder, and did so in detail, it is unnecessary to discount it.

11. Next, the Tribunal points out that the appraisal reports covered by Circular No. 366 are drawn up electronically using the official appraisal form provided for that purpose, to which the circular refers. The second paragraph of Section B(10) of Circular No. 366, relating to the performance management cycle, provides that the staff member may make comments on the appraisal report in the corresponding section of the electronic form. In respect of the conciliation procedure set out in Section B(11), the conciliation meeting must be attended by the countersigning officer, the reporting officer and the staff member concerned. If the staff member is still dissatisfied after the conciliation, she or he may pursue the matter by raising an objection with the Appraisals Committee, stating in writing the grounds for the objection and the relief claimed (subparagraph (b) of the first paragraph of Section B(12)). However, in this case, the Tribunal observes that, in the 2015 appraisal report, the complainant did not provide any comments in the corresponding section of the form, while the grounds for objection that he stated in writing were vague, general and somewhat brief.

12. That said, quite apart from the fact that the Organisation disputes all his grievances in a factual, exact and articulate manner in its submissions, the exercise which the complainant invites the Tribunal to carry out with regard to his productivity targets, overall rating, certain allegedly wrong or incorrect figures and, in his view, inappropriate applications of the new method for processing patent applications known as “BEST” (Bringing Examination and Search Together) and the PAX calculation rules is essentially a fresh appraisal of his performance for 2015. However, that misconstrues the Tribunal’s role in this area in view of its limited power of review under its settled case law (see, for example, Judgments 4564, consideration 3, and 3252, consideration 6, also cited in aforementioned Judgment 4637, consideration 13).

This is particularly true in circumstances where the complainant chose, first, not to provide exact, detailed written comments in the corresponding section of the electronic appraisal report form as Circular No. 366 permitted him to do and, second, to state only general criticisms in his objection to the Appraisals Committee. The length of the complainant’s observations in his submissions to the Tribunal and

their annexes contrasts with the brevity of those he submitted in the context of the appraisal, conciliation and objection mechanisms provided for in the Organisation's internal process for challenging performance appraisals.

The Tribunal considers that, in respect of this first set of grievances, the complainant does not provide any evidence that would lead to a finding that the appraisal report was flawed.

13. As regards the complainant's suspicions of bias on the part of the two reporting officers and the Chairwoman of the Appraisals Committee, to which he draws attention in his submissions, under the Tribunal's case law mere suspicion is not enough; it is for the complainant, who bears the burden of proving such allegations, to bring evidence of sufficient quality and weight to persuade the Tribunal (see Judgments 4543, consideration 8, 4382, consideration 11, and 3380, consideration 9, cited in aforementioned Judgment 4637, consideration 17).

The Tribunal notes in this respect that the complainant, on the basis of his allegations that the EPO is prejudiced against him, refers to several disputes he has had with the Organisation in a series of other cases (corresponding to his fifth, sixth, seventh and ninth complaints). However, besides the fact that these circumstances do not provide any further support for the complainant's suspicions of bias, they are irrelevant in determining whether the 2015 appraisal report is lawful.

The complainant's grievances in this respect are unsubstantiated.

14. As far as the alleged threats and harassment are concerned, the Tribunal observes that the complainant's arguments are mainly based on what he describes as the EPO's failure "to take preventative and prohibitive measures in compliance with Circular No. 341".

First, in respect of the alleged threats, the complainant dwells on events that took place in 2012, grievances raised in his fourth, sixth and seventh complaints, and the disciplinary proceedings to which his fifth and ninth complaints refer. Second, in respect of the alleged harassment, the complainant's submissions concern the periods covered by his claims relating to his medical file which are dealt with in his fourth complaint,

events that took place before his 2014 staff report and 2015 appraisal report were drawn up, harassment that took place during the 2014 reporting period and other harassment that occurred during the 2015 appraisal period concerning medical consultations, sick leave and disciplinary proceedings.

However, since there is no evidence in the file showing that the complainant lodged a formal internal complaint of harassment against his reporting officers, the Chairwoman of the Appraisals Committee or the Organisation despite Circular No. 341 offering him that possibility, the complainant cannot extend the scope of the present complaint to turn it into a complaint of harassment by referring to alleged threats, intimidation or other harassment that supposedly rendered the 2015 appraisal report flawed.

The Tribunal concludes from the foregoing that the complainant has not proved that his 2015 appraisal report was flawed or unlawful.

15. Lastly, in respect of the complainant's claim for compensation for the moral injury caused by "intimidation, threats and bias by all superiors", since the complainant acknowledges in his rejoinder that this claim relates only to "moral injury caused and suffered solely owing to harassment from the beginning to the end of the 2015 [reporting] period", the alleged injury is in any event clearly unrelated to his 2015 appraisal. This applies particularly to the injury caused by the pressure to which he submits he was subjected to take early retirement.

The complainant's claim for compensation is thus unfounded.

16. 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 4 November 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ