

d. I. T. (No. 21)

v.

EPO

136th Session

Judgment No. 4718

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-first complaint filed by Mr D. d. I. T. against the European Patent Organisation (EPO) on 5 October 2016 and corrected on 29 November, the EPO's reply of 20 March 2017, the complainant's rejoinder of 26 June 2017 and the EPO's surrejoinder of 3 October 2017;

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 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 Administrative Council decision CA/D 10/14 of 11 December 2014, effective 1 January 2015.

On 7 July 2015, the complainant – a permanent employee of the European Patent Office, the EPO’s secretariat, since 2002 working as an examiner and a 50 per cent staff representative at the material time – held the intermediate review meeting of his 2015 appraisal performance with his reporting officer. During that meeting he was informed that his productivity was below the objective, which could lead to a marking of “do[es] not correspond to the level required”. Measures to support him were discussed aimed at helping him to increase his productivity.

On 17 March 2016, his appraisal report for the period covering 1 January to 31 December 2015 was signed by his reporting officer and countersigning officer. His overall performance was assessed as “acceptable, with some areas of improvement, which ha[d] been addressed with [him]”. Disagreeing with the report, the complainant requested that a conciliation procedure be initiated.

A meeting took place on 17 March 2016, following which the appraisal report was upheld. On 4 April, he raised an objection with the Appraisals Committee. He argued that he had never been informed of the methodology used to assess impartially, objectively and transparently his skills and work, contested the new career system introduced in 2015, pointed out that his work as a staff representative had not been evaluated and claimed that his individual rights were breached.

In its opinion of 24 June 2016, the Appraisals Committee recommended that the complainant’s objection be rejected and his appraisal report for 2015, which in its view was neither arbitrary nor discriminatory, be confirmed. By a letter dated 8 July 2016, 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 set aside the impugned decision, as well as decision CA/D 10/14, Article 110a of the Service Regulations, Circular No. 366 and a large number of other general decisions, circulars, guidelines, notices and communiqués related, in his view, to the new performance appraisal system. He further seeks that the EPO be ordered to (1) issue a new appraisal report free from negative markings, remarks and comments; (2) establish lawful, transparent,

objective, fair and unbiased criteria and mechanisms for setting objectives and appraisal reporting; (3) stop the application of the productivity expectations per grade and of the System for assessing examiners' productivity ("PAX") and of all general decisions that he requests to be quashed; (4) comply with the European Patent Convention; (5) establish a career development plan with corresponding appraisal reports in accordance with the principles of good administration, legal security and the rule of law; and (6) refrain from using concepts of "poor performers", "underperformers" or any other concept with negative connotations and delete those concepts from its internal rules. The complainant also requests that his case be sent back to the EPO for a complete treatment of the dispute by a competent organ – that is to say, the Internal Appeals Committee – correctly constituted. He finally seeks an award of moral damages and costs, and any other relief as the Tribunal deems to be just, fair and equitable.

The EPO argues that the complainant unduly attempts to broaden the scope of the dispute to general decisions and provisions unrelated to his appraisal report and considers the complaint to be irreceivable insofar as the complainant seeks the setting aside of those general decisions and provisions. It also considers the complaint to be irreceivable insofar as the complainant requests specific actions from the EPO which are outside the Tribunal's competence. The EPO requests that the complaint be dismissed as partly irreceivable and unfounded. Should the Tribunal decide to set aside the appraisal report, it notes that such ruling would be deemed to afford sufficient redress to the complainant.

CONSIDERATIONS

1. In the decision contained in a letter of 8 July 2016, which the complainant impugns, the Vice-President of Directorate-General 4 (DG4) accepted the opinion of the Appraisals Committee and its conclusion that the complainant had provided no evidence, or even arguments, to substantiate his contention that the assessment of his performance in his appraisal report for the period 1 January to 31 December 2015 was

arbitrary or discriminatory. The Vice-President also accepted the Appraisals Committee's recommendations to reject the complainant's objection and to confirm his 2015 appraisal report. He therefore deemed the report final and informed the complainant that it would be placed on his personal file, together with a copy of the Committee's opinion.

2. At relevant times, the regulatory framework for appraisal reports for the 2015 period was provided in Circular No. 366. At the same time as this circular took effect, the Administrative Council issued decision CA/D 10/14, which introduced a new career system for the EPO. It redesigned notably the classification of jobs and grades; the conditions of step advancement; the promotion procedure and the performance management system. Article 37 of decision CA/D 10/14 amended Article 109(3) of the Service Regulations to exclude appraisal reports from the review procedure as had been the previous position. Article 39 of decision CA/D 10/14 inserted Article 110a into the Service Regulations, under the heading "Objection procedure for appraisal reports". Article 110a(1) stated that, in case of disagreement on an appraisal report, the parties to the dispute shall endeavour to settle it through conciliation. Article 110a(2) stated that an employee who is dissatisfied with her or his appraisal report at the outcome of the conciliation may challenge it by raising an objection with the Appraisals Committee. Article 110a(4) stated that the Appraisals Committee "shall review whether the appraisal report was arbitrary or discriminatory". Article 110a(5) stated that the competent authority shall take a final decision on the objection, having due regard to the assessment of the Appraisals Committee. Article 38 of decision CA/D 10/14 amended Article 110(2) of the Service Regulations to exclude appraisal reports from the internal appeal procedure before the Internal Appeals Committee.

3. Circular No. 366 contained a conciliation procedure set out in Section B(11). It also contained a detailed objection procedure before an Appraisals Committee, set out in Sections B(12) and B(13), which stated as follows:

“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 20 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.”

4. As the complainant challenged the impugned decision on procedural and substantive grounds, the Tribunal recalls the following statement which it made in Judgment 4564, consideration 3, concerning the limited power of review that it exercises in the matter of staff appraisals:

“[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.”

In Judgment 4637, having recalled that statement, the Tribunal observed, in consideration 13, that:

“Since the Tribunal’s power of review does not extend to determining as such whether appraisals are well founded, 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.”

5. Before considering the merits of this complaint, some procedural matters, including a procedural application will be addressed. Citing “the need of procedural economy and efficiency”, the complainant seeks the joinder of this complaint with two other complaints he filed with the Tribunal, as well as with a number of internal appeals he lodged with the Internal Appeals Committee, which the latter refused to join in a single procedure. He states that those cases are directed against the introduction of general decision CA/D 10/14 by the Administrative Council, as well as against Circulars Nos. 364 (concerning the implementation of the career system), 365 (entitled “General Guidelines on the EPO Competency Framework”) and 366 (entitled “General Guidelines on Performance Management”) and a number of guidelines, notices and communiqués, which, he alleges, unlawfully damaged his rights. He further states that all those procedures “have overlapping subject-matter, as they refer to different aspects of the transformation of his job as patent examiner, as well as of the different interferences which have been created in his daily tasks [which] procedures contribute to a gradual but serious degradation of [his] status, and to the creation [of] serious interferences in his work as [e]xaminer”. However, the joinder of a complaint with pending internal appeals is not possible. Additionally, as the complaints which the complainant seeks to have joined are not concerned with the appraisal of his 2015 performance and do not raise the same issues of fact and law, the application for joinder is rejected.

6. In requesting the setting aside of the impugned decision and of his 2015 appraisal report, the complainant also requests the Tribunal to set aside decision CA/D 10/14, Circulars Nos. 364, 365 and 366, Article 110a of the Service Regulations, as well as a number of guidelines, notices and communiqués the Office issued over a period

of time. Inasmuch as decision CA/D 10/14, Circular No. 366 and Article 110a introduced amendments to the rules for staff appraisals with effect from 1 January 2015, they can be challenged in these proceedings, albeit only to the extent that their provisions were applied in a manner prejudicial to the complainant (see, for example, Judgment 4563, consideration 7, and the case law cited therein) and thus affected the establishment of the subject appraisal report. However, the request to set aside Circulars Nos. 364 and 365 is irreceivable, as the EPO submits. Inasmuch as the complainant centrally challenges his 2015 appraisal report, he can only request setting aside those aspects of these general decisions which had any bearing on the establishment and the content of his report. The complainant's requests to set aside the various guidelines, notices and communiqués, which, he alleges, unlawfully damaged his rights, are also irreceivable. Quite apart from the fact that they are unrelated to the establishment of his 2015 appraisal report, the complainant states that he has already challenged them in a number of internal appeals. His attempt to challenge them in these proceedings is therefore an impermissible duplication of proceedings (see, for example, Judgment 3146, consideration 11).

7. The complainant further requests the Tribunal to order the EPO to issue a new appraisal report free from negative markings, remarks and comments with an overall rating of "acceptable" reflecting his good work and competencies; to establish lawful, transparent, objective, fair and unbiased criteria and mechanisms for objective setting and appraisal reporting; to cease the application to him of the productivity expectations per grade and of the System for assessing examiners' productivity ("PAX") and of all decisions provided in Annexes 11 to 30 to the complaint; to comply with the European Patent Convention in its entirety; to establish a career development plan with corresponding appraisal reports in accordance with the principles of good administration, legal security and the rule of law; to refrain from using concepts of "poor performers", "underperformers" or any other concept with negative connotations and to cease any further measure contributing to such characterization; and to delete those concepts from all internal documents and rules. These requests are rejected as

irreceivable because the Tribunal does not issue such orders, which can be characterised as injunctions or declarations.

8. The complainant's request to set aside decision CA/D 10/14 because it was adopted without consulting the General Advisory Committee (GAC) is unfounded as no consultation was possible with a body that no longer existed at the material time. As a matter of fact, on 28 March 2014, the Administrative Council adopted decision CA/D 2/14 replacing the GAC by the General Consultative Committee (GCC) with effect from 1 July 2014.

His submission that decision CA/D 10/14 was unlawfully adopted because the GCC was unlawfully constituted is also unfounded given the Tribunal's conclusion to the contrary in consideration 9 of Judgment 4714. The complainant's further submission that the consultative process with the GCC was flawed because decision CA/D 10/14 was only placed on its agenda for information rather than consultation is also unfounded as he provides no evidence to support this submission.

His further submission that decision CA/D 10/14 was unlawfully adopted because the Central Staff Committee (CSC) was not able to carry out its mandate under the Service Regulations is also unfounded. In the first place, as the EPO points out, there was no legal basis for consultation with that Committee on decision CA/D 10/14. The consultation was with the GCC. In the second place, as the EPO further points out, pursuant to Article 38 of the Service Regulations (in its 2014 applicable version), members of that Committee are members of the GCC, which presented an opinion on decision CA/D 10/14. Moreover, contrary to the complainant's submission, members of the GCC, including CSC members, were able to carry out their duty as such, even if not in person, by various means of communication.

9. The complainant's submission that there was no consultation with the GCC concerning certain benchmarks for the expected productivity per grade, which, he states, were used in planning and evaluating the work of examiners, is also unfounded as the complainant

provides no legal basis that required the Office to consult that body concerning the subject matter. Neither does he provide any legal basis that required consultation with the GCC concerning the PAX calculation rules (which, he states, are also important parameters used for setting individual objectives and to justify the appraisal report) for the 2015 appraisal period. The complainant's submission that decision CA/D 10/14 should have been submitted for scrutiny to the Central Occupational Health and Safety Committee is also unfounded as there was no basis for its submission to that body. So too is his submission that decision CA/D 10/14 was unlawfully adopted because when, at its 144th meeting, the Administrative Council dismissed all requests for review of decision CA/D 10/14 as manifestly irreceivable, it endorsed a recommendation of decision CA/D 48/15 which did not include any reference to his individual request to review decision CA/D 10/14. He insists that, if the Administrative Council had made a decision on his request, it would have seen that it was receivable and that, moreover, it would have made an individual decision that would have entitled him to file an internal appeal against its general decision. It is not apparent that this issue legitimately arises in the context of his challenge to his 2015 appraisal report. It is therefore rejected.

10. The complainant submits that there were unlawful substantive flaws in decision CA/D 10/14, which also tainted Circular No. 366 and its amendments to the Service Regulations, including Article 110a, thereby introducing unlawful provisions under which his 2015 appraisal report was established. To support this submission he complains about new promotion and career progression mechanisms; the abolition of promotion boards, which, he states, removed any balanced conciliation mechanism for reviewing appraisal reports; other matters related to promotion and constraints on step advancement in the new career system and pension entitlements; bonuses; alleged interferences with the responsibilities vested in the examining and other divisions; as well as about matters related to the powers of the President of the Office that, he alleges, are *ultra vires* with regard to the provisions of the European Patent Convention. As those matters were not directly related to the complainant's 2015 appraisal report, the submission is unfounded.

11. The complainant further submits that (1) there were flaws in the Appraisals Committee's procedure as it was not lawfully constituted because its members were exclusively nominated by the President; (2) the limitation of the Committee's mandate to determine whether his 2015 appraisal report was arbitrary or discriminatory was unlawful; (3) he had an acquired right and legitimate expectations to have any decision negatively impacting him, particularly his appraisal report, reviewed by an internal appeal body, which right existed prior to the introduction of decision CA/D 10/14, rather than by the Appraisals Committee whose impartiality is not guaranteed; and (4) there was a breach of his right to due process as he was only given ten days to raise his objection with the Appraisals Committee and this unduly restricted his right to defend himself. These submissions are unfounded. The Tribunal has rejected similar arguments which were proffered against the background of the same legal framework in similar circumstances (see, for example, Judgments 4713, consideration 9, and 4637, considerations 11 to 14). Accordingly, the Tribunal rejects the complainant's request to remit the case to the EPO for it to be treated by the Internal Appeals Committee.

12. The complainant submits that the Appraisals Committee's opinion was based on vague and general assertions of a broad nature, which clearly indicates that it did not carry out a serious and unbiased assessment of his performance and did not perform an in-depth analysis of his 2015 appraisal. This submission misapprehends the fact that the Committee's mandate to review appraisal reports by determining whether the appraisal made by the reporting and countersigning officers was arbitrary or discriminatory does not in itself render the procedure before the Committee flawed (see Judgment 4637, consideration 11, referring to Judgment 4257, considerations 12 and 13). Contrary to the complainant's submission, the Committee's opinion was fairly substantiated, in accordance with its mandate, and cannot be faulted on the bases of such submission, which is therefore unfounded.

13. Concerning the substantive aspects of the complainant's objection to his 2015 appraisal report and his request that he be awarded an overall marking of "corresponding to the level required for the function", instead of "acceptable", the Tribunal recalls its case law, stated, for example, in consideration 13 of Judgment 4637, referring to Judgment 4257, that its power to review appraisal reports is limited to considering, among other things, whether there was illegality in drawing up the contested report. Additionally, as the Tribunal's power of review does not extend to determining whether the report was well founded, the fact that the Appraisals Committee's mandate 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.

14. The complainant's submissions that his 2015 appraisal report and the impugned decision that confirmed it were substantively flawed because (1) his productivity objectives were arbitrarily set and contained arbitrary binding personal objectives, which, in 2015, increased the productivity expected from him compared to previous years, relating to productivity expectations per grade and to PAX references; (2) the productivity factor which was used was unsuitable for assessing the work he did and the report contained arbitrary evaluation of his competences; and (3) important parts of the content of his appraisal were arbitrary, implicitly invite the Tribunal to intervene into the realm of technical considerations that are not within its purview. In any event, these submissions are unfounded as the complainant provides no evidence in support of them.

15. The complainant's further submission that his 2015 appraisal report was unlawfully established because it contained negative markings and remarks that were unsubstantiated is also unfounded. His reporting and countersigning officers in fact substantiated their markings with comments, albeit they did not do so with the details the complainant suggests and for which he provides no legal basis. Additionally, the complainant's submission that his 2015 appraisal report, as well as the impugned decision which confirmed it, should be set aside for failure

to evaluate his work as a staff representative, which represented 50 per cent of his working time during the 2015 period, is also unfounded by reference to consideration 7 of Judgment 4281 (citing Judgment 3666, consideration 8), in which the Tribunal stated that assigning an official to a post in which 50 per cent of his activity was devoted to the tasks listed in his job description (with the remaining 50 per cent devoted to his staff union activities) allowed for periodic performance appraisals by a line manager. It did not prevent him from being the subject of various performance appraisal reports relating to his duties as a staff member, which was actually undertaken in establishing his 2015 appraisal report.

16. As the complainant provides no persuasive proof of circumstances falling within the scope of the Tribunal's limited power of review, the Tribunal finds no fault with his 2015 appraisal report in the circumstances of this case. The Tribunal agrees with the Appraisals Committee that the complainant has not provided any evidence proving that his appraisal report was flawed. The Vice-President of DG4 therefore correctly accepted this conclusion in the impugned decision.

17. 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 16 May 2023, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

CLÉMENT GASCON

DRAŽEN PETROVIĆ