

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

B. (No. 15)

v.

EPO

136th Session

Judgment No. 4719

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifteenth complaint filed by Mr K. B. against the European Patent Organisation (EPO) on 9 October 2016, the EPO's reply of 13 March 2017, the complainant's rejoinder of 7 July 2017, corrected on 26 July, and the EPO's surrejoinder of 26 October 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 Administrative Council decision CA/D 10/14 of 11 December 2014, effective 1 January 2015.

On 14 August 2015, the complainant – a permanent employee of the European Patent Office, the EPO’s secretariat, since 1985 working as an examiner – held the intermediate review meeting of his 2015 performance appraisal with his reporting officer. During that meeting he was informed that his performance was below what could be expected from an examiner of his experience and grade and that his work needed improvement, in particular his productivity.

On 19 April 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 “not correspond[ing] to the level required for the function”. Disagreeing with the report, the complainant requested that a conciliation procedure be initiated. A meeting took place on the same day, following which the appraisal report was upheld.

On 6 May 2016, he raised an objection with the Appraisals Committee. He contested the new career system introduced in 2015 and argued, among other things, that the productivity objectives which had been set were unattainable and that his fragile health situation – resulting in a reduction of productivity – was not taken into account when assessing his performance.

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 and that the EPO be ordered to issue a new appraisal report free from negative markings, remarks and comments, establish lawful, transparent, objective, fair and unbiased criteria and mechanisms for setting objectives and appraisal reporting and stop the application of the productivity expectations per grade and of the System for assessing examiners’ productivity (“PAX”). He 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 considers the complaint to be irreceivable insofar as the complainant requests specific actions from the Organisation 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.

In his rejoinder, the complainant claims to impugn also decision CA/D 10/14 and Circular No. 366, which, in his view, are flawed and thus unlawful.

In its surrejoinder, the EPO argues that, by doing so, the complainant unduly attempts to broaden the scope of the dispute by formulating a “too vague and general” claim which is in any case irreceivable for failure to exhaust the internal means of redress.

CONSIDERATIONS

1. This complaint is the culmination of the complainant's challenges against his appraisal report for the period 1 January to 31 December 2015, which his reporting officer and countersigning officer signed on 19 April 2016. The complainant's overall performance was assessed as “not correspond[ing] to the level required for [his] function” as he, in their view, repeatedly did not show a stable performance at the required level and his productivity and production, in particular, needed improvement. After the appraisal report was confirmed following a conciliation procedure held pursuant to Section B(11) of Circular No. 366, the complainant raised an objection with the Appraisals Committee pursuant to Sections B(12) and B(13) of Circular No. 366. The Committee recommended rejecting the objection and confirming the complainant's 2015 appraisal report. It concluded that he had provided no evidence, not even arguments, to substantiate a case that the assessment of his performance was arbitrary or discriminatory and that, moreover, his arguments reflected more a

relative and subjective divergence of views rather than a flaw in the appraisal. The complainant impugns the decision in which the Vice-President of Directorate-General 4 (DG4) accepted the Committee's opinion and recommendations.

2. Since the provisions applicable to this complaint are the same as those cited in Judgment 4718, 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.

3. In its opinion, the Appraisals Committee noted the complainant's arguments as follows: his 2015 appraisal report was based on false assumptions concerning his production capacity; the new career system, introduced by decision CA/D 10/14, was not suitable to be applied to him as an examiner who was at the end of his career and was not in the best state of health; and the performance objectives as required by the "Guidance to Performance Assessment of Examiners in [Directorate-General 1]" were not attainable having regard to his past performance, age and medical condition.

4. In the complaint form, the complainant lists a number of orders he seeks which the Tribunal sets out as follows:

- (1) to quash the impugned decision which confirms his appraisal report;
- (2) to order the EPO to issue a new appraisal report for 2015 free from negative markings and remarks;
- (3) to order the EPO to issue a new appraisal report for 2015 with an overall marking of "acceptable" if not "corresponding to the level required for the function";
- (4) to order the EPO to issue a new appraisal report for 2015 deleting the following types of comments: "productivity is clearly below the expectation for his [g]rade" and "the productivity objective proposed was below the range expected from an examiner of his experience";

- (5) to order the EPO to issue a new appraisal report for 2015 in which the markings (“intermediate”) in the functional competences are deleted;
- (6) to order the EPO to correct his 2015 appraisal report removing any negative mention of his productivity/production in relationship with any expectations per grade, and consequently adapting the overall assessment of his work, and the assessment of his functional and core competencies to fairly reflect his good work;
- (7) to order the EPO to establish lawful, transparent, fair and unbiased criteria and mechanisms for setting objectives and for appraisal reporting, which would ensure that his work is fairly planned and evaluated and to ensure that he does not suffer undue disadvantages in his appraisal report from systematic interferences created by the current career system in his daily work as a patent examiner and member of the Division;
- (8) to order the EPO to stop the application of the productivity expectations per grade and of the System for assessing examiners’ productivity (“PAX”) to him;
- (9) subsidiarily to the foregoing requests, to order that the matter be remitted to the EPO for it to be treated by the competent organ, that is the Internal Appeals Committee, correctly constituted;
- (10) to order the EPO to treat this complaint jointly with the “interrelated cases”;
- (11) to award him moral damages and costs; and
- (12) to award him such other relief as the Tribunal deems just, fair and equitable.

5. As the complainant has not identified any of the “interrelated cases” he seeks, in item 10 above, to have joined with this complaint, his request for joinder is rejected.

6. The complainant's request for oral proceedings is rejected as the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to allow it to be properly informed of their arguments and of the relevant evidence.

7. The complainant's claim, in item 12 above, to be awarded such other relief as the Tribunal deems just, fair and equitable is too vague to be receivable (see, for example, Judgments 4602, consideration 8, and 550, consideration 10). The complainant's requests in items 2 to 8 are also irreceivable as the Tribunal cannot issue orders of this kind, which, in the main, involve an impermissible determination by the Tribunal of what the appraisal should be and which criteria should be used. This complaint centrally requires the Tribunal to determine whether the impugned decision, which confirmed the complainant's 2015 appraisal report, should be set aside and what relief should follow if it is.

8. In challenging his 2015 appraisal report on procedural grounds, the complainant submits that the Appraisals Committee's procedure established for the 2015 period under decision CA/D 10/14, as enacted in Article 110a of the Service Regulations, and Circular No. 366, was unlawful. He argues, in particular, that the limitation of the Committee's review of appraisal reports to determining whether they are arbitrary or discriminatory did not allow it to carry out an in-depth analysis of his report. For example, it did not identify the basic elements of the PAX calculation rules and other considerations; it did not identify the search to examination *ratio*, the complexity of the files, the current Peer Reference Examiner Data and the expectation of productivity or production per grade; and it did not consider important elements such as interferences in his work as an examiner and other factors. In essence, these arguments invite the Appraisals Committee to carry out its own assessment of his performance in 2015, which the new appraisal system did not empower it to do.

The foregoing and the complainant's further arguments that the restriction of the Appraisals Committee's review mandate breached his acquired rights and legitimate expectations; that his appraisal report should have been challengeable on wider legal grounds and should have

been referred to the Internal Appeals Committee for an in-depth analysis; that the composition of the Appraisals Committee did not guarantee its impartiality nor his right to due process; and that his right to defend himself was breached because he only had ten days to present his objection with the Appraisals Committee 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, 4637, considerations 11 to 14, and 4257, considerations 12 to 14).

9. The complainant's submissions to the effect that the procedure for establishing his 2015 appraisal report is vitiated as his performance was judged on the basis of the PAX calculation rules and on his expected productivity per grade, which did not follow the statutory consultation process with the General Advisory Committee (GAC) or the General Consultative Committee (GCC), are also unfounded. The complainant does not refer to any legal provision in support of this submission and refers to no established practice that requires such consultation. In any event, no consultation was possible with the GAC, which no longer existed at the material time.

10. The complainant's submission, in effect, that his 2015 appraisal report was unlawfully established because the Appraisals Committee's opinion was unsubstantiated is unfounded as the Tribunal finds that the Committee fairly substantiated its opinion within the terms of its mandate to determine whether the report was arbitrary or discriminatory.

11. Regarding the complainant's challenge to the substantive aspects of his 2015 appraisal report, it is convenient to recall the following statement which the Tribunal 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 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.”

12. The complainant submits, in effect, that he did not obtain the markings and the overall rating he should have obtained because his personal objectives were arbitrarily set. This is however not borne out by the evidence. He raises other issues which invite the Tribunal to consider technical aspects of the assessment of his performance, which is not within its limited power of review. Regarding the complainant’s arguments that the evaluation of his competencies was arbitrary, that there was a failure to substantiate negative assessments or remarks and that his skills were arbitrarily assessed, it seems apparent from the Appraisals Committee’s opinion that these matters were explained to the complainant in the conciliation meeting. The complainant’s submission to the effect that his appraisal report was flawed because his reporting and countersigning officers failed to evaluate the work he performed as staff representative in past years and still performed unofficially, which the Appraisals Committee and the Vice-President of DG4 should have concluded, is unfounded. The complainant provides no legal basis for the assessment of that work.

13. 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.

14. 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