

**H. (No. 4)**

**v.**

**EPO**

**136th Session**

**Judgment No. 4725**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr H. H. against the European Patent Organisation (EPO) on 6 October 2016 and corrected on 15 December, the EPO's reply of 10 April 2017, the complainant's rejoinder of 18 May 2017 and the EPO's surrejoinder of 30 August 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.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat, since 2003. At the material time he was working as an examiner. On 13 April 2015, he objected to the production and quality objectives set by his reporting officer for 2015 raising "objectively justified suspicion of partiality". On 17 June 2015, he lodged a request for review against the individual decision on his objectives setting, which was rejected as manifestly irreceivable as the setting of those objectives was merely a preparatory step within the appraisal exercise and thus did not constitute a challengeable decision. On 16 September 2015, he lodged an appeal which was still pending at the time of the present complaint.

On 5 February 2016, the complainant requested the replacement of his reporting and countersigning officers whom he suspected of bias. His request was rejected on 3 March on the basis that he did not submit "sufficient grounds to shed any doubts on the [reporting and countersigning officers'] neutrality".

After a prior interview with his reporting officer, his appraisal report for the period covering 1 January to 31 December 2015 was signed by the former on 18 March 2016 and by the countersigning officer on 21 March 2016. His overall performance was assessed as "acceptable, with some areas of improvement, which have been addressed with the staff member". On 19 April, the complainant submitted comments in the report expressing his disagreement with some aspects of it, reiterating his suspicion of partiality and criticising the objectives setting. He requested, among other things, that the contested report be set aside and that a new report be drawn up by unbiased officers truly reflecting his expertise and performance.

A conciliation meeting took place on 2 May 2016, following which the appraisal report was maintained. On 17 May, the complainant raised an objection with the Appraisals Committee.

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.

In his complaint, the complainant asks the Tribunal to set aside the impugned decision and to declare that the Appraisals Committee's opinion and his 2015 appraisal report are null and void. He further requests that the allegedly flawed report be removed from his personal file and that a new report be drawn up and signed by impartial officers with a better overall performance assessment. He also seeks recognition of partiality of the involved officers. Moreover, he requests that the Tribunal declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal, and that it orders compensation for the moral and financial injuries allegedly suffered, as well as monetary damages for the foreseeable denial of step advancement in 2016.

The EPO notes that the complainant attempts to broaden the scope of the dispute by focusing on the disagreements between him and his line managers rather than on the appraisal report itself. It argues that the complainant's request that a new appraisal report be drawn up amounts to an injunction which is outside the Tribunal's jurisdiction. As to the claim regarding monetary compensation, it contends that the complainant is not allowed to file claims about a separate and distinct decision. Finally, concerning the claims on the alleged illegality of decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366, it notes that such claim was already raised in another complaint and contends that the complainant may only request that the aspects of a general decision giving rise to an individual implementation be set aside. The EPO requests the Tribunal to dismiss the complaint as partly irreceivable and unfounded. Should it decide to set aside the appraisal report, the EPO considers that such ruling would be deemed to afford sufficient redress to the complainant.

#### CONSIDERATIONS

1. After an unsuccessful conciliation procedure, the complainant raised an objection to his 1 January to 31 December 2015 appraisal report with the Appraisals Committee. In the subject appraisal report,

his reporting and countersigning officers had assessed his performance for the subject period as “acceptable, with some areas of improvement, which ha[d] been addressed with [him]”. He complained that (1) from previous comments they had made, including in his 2014 staff report, in the concomitant objection procedure and in several pending internal appeals, he suspected his reporting and countersigning officers to be partial; (2) he did not have the opportunity to be accompanied by someone to the conciliation meeting; (3) the assessment of his functional competencies did not reflect his expertise and performance, and he considered it as an attack on his dignity; (4) he was set higher arbitrary objectives for his 2015 appraisal than for 2014, without being given the means to achieve them; and (5) his countersigning officer’s decision to close the Berlin Office led to circumstances which made the fulfilment of the objectives that were set impossible.

2. In its opinion, which the Vice-President of Directorate-General 4 (DG4) accepted in the impugned decision of 8 July 2016, the Appraisals Committee recommended rejecting the complainant’s objection and confirming his 2015 appraisal report. The Committee concluded that the complainant had not substantiated his allegations of partiality on the part of his reporting and countersigning officers, noting that the issue was addressed in a letter prior to the conciliation meeting; that, under Circular No. 366, the conciliation meeting is to be between the staff member and her or his reporting and countersigning officers and there is no provision for a staff member to be accompanied; that, in the conciliation meeting, the complainant’s reporting officer duly substantiated the assessment, particularly explaining that it was based on competencies applied to the job of examiner, which involved different aspects such as knowledge of procedures and tools, as well as how quickly those procedures were handled. Noting the complainant’s statement that he had pending internal appeals against other reporting periods and the increased objectives that were set for him for the 2015 appraisal period, which objectives, he argued, were set arbitrarily and that he had not been given the means to achieve them, the Appraisals Committee concluded that such appeals did not have a suspensive effect on the impugned decision and that the issue of the closure of the Berlin

Office was outside its scope of review and that there was a specific procedure in place for contesting such a decision. The Appraisals Committee further concluded that it seemed that the overall assessment given by the complainant's reporting officer, which fell within his wide discretionary purview, was based on objective elements and that the complainant presented no evidence nor arguments based on his global performance in 2015 to substantiate his allegation that his appraisal report was arbitrary or discriminatory. Finally, the Committee concluded that the complainant's arguments reflected more a relative and subjective divergence between his views and those of the reporting and countersigning officers rather than a flaw in the assessment.

3. The Vice-President of DG4 accepted the opinion of the Appraisals Committee and its conclusion that the complainant had provided no evidence, not even arguments, to substantiate his contention that the assessment of his performance in his 2015 appraisal report was arbitrary or discriminatory. The Vice-President also accepted the Appraisals Committee's recommendations to reject the complainant's objection and to confirm the subject 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.

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

- (1) to quash the impugned decision in its entirety *ab initio*;
- (2) to declare the opinion of the Appraisals Committee null and void;
- (3) to declare his 2015 appraisal report arbitrary and discriminatory;
- (4) to quash his 2015 appraisal report and to order that it be removed from his personal file;
- (5) to order that a new appraisal report for 2015 be drawn up and signed by impartial officers, with a far better overall performance assessment that truly reflects his expertise and performance;
- (6) to recognize the partiality of the reporting and countersigning officers;

- (7) to declare decision CA/D 10/14, Circular No. 366 and Article 110a of the Service Regulations illegal;
- (8) to grant him compensation for moral and financial damages caused by the 2015 appraisal report in the amount of 40,000 euros, in view of continued attacks on him by his reporting and countersigning officers dating back to at least 2012;
- (9) to grant him an additional amount of 1,000 euros per month until a new appraisal report is drawn up;
- (10) to compensate him in damages insofar as they arise, for example, for the foreseeable denial of step advancement in 2016 based on his 2015 appraisal report;
- (11) to order that oral proceedings be held pursuant to Article 12, paragraph 1, of the Tribunal's Rules.

5. The complainant's request for oral proceedings, in item 11 above, 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.

6. The complainant's request, in item 2 above, to declare null and void the Appraisals Committee's opinion, dated 24 June 2016, is irreceivable as, in itself, that opinion was merely a preparatory step in the process of reaching the final decision, which the complainant impugns. Established precedent has it that such an advisory opinion does not in itself constitute a decision which may be impugned before the Tribunal (see, for example, Judgments 4637, consideration 5, and 3171, consideration 13).

7. The complainant's request, in item 5 above, to order that a new appraisal report for 2015 be drawn up and signed by impartial officers, with a far better overall performance assessment that truly reflects his expertise and performance, is rejected as irreceivable because the Tribunal does not issue such an order, which can be characterised as an injunction.

8. The complainant's claim, in item 10 above, for an order to compensate him in damages insofar as they arise, for example, for the foreseeable denial of step advancement in 2016 based on his 2015 appraisal report is rejected. As the EPO argues, correctly, the complainant cannot challenge the decision to deny him a step advancement in 2016 as this was a separate decision, even if based directly or indirectly on the 2015 appraisal report, which has not been challenged by way of an internal appeal.

9. The EPO advances two arguments for its submission that the complainant's claim, in item 7 above, for an order declaring general decision CA/D 10/14, Circular No. 366 and Article 110a of the Service Regulations illegal, is irreceivable. Its first argument, founded on settled case law, is that these general decisions may only be challenged 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, so that the complainant can only request the setting aside of those aspects of these general decisions which had any bearing on the establishment and the content of his report. Since, in the present case, Article 110a of the Service Regulations that enacted the new objection procedure, which was itself introduced by Article 39 of decision CA/D 10/14, and Sections B(11) to B(13) of Circular No. 366, has been applied in an individual decision affecting the complainant, namely the application of the new procedures to the review of his grievances about the terms of the 2015 appraisal report, he can challenge the lawfulness of the related aspects of those general decisions. Accordingly, the EPO's second argument, citing consideration 11 of Judgment 3146, that the complainant's claim for an order declaring the subject general decisions illegal is irreceivable because he had already made a claim for the same order in his second complaint against his 2014 staff report is rejected.

10. It is however noted that the arguments the complainant advances in this complaint to support his claim to declare the subject general decisions illegal are similar to those he proffered in his second

complaint to support a similar claim, which the Tribunal rejected in Judgment 4257, delivered in public on 10 February 2020. Those arguments are unfounded for the same reasons contained in Judgment 4257.

11. As the complainant purports to challenge 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.”

12. As the submissions the complainant proffers to support his challenge to the establishment of his 2015 appraisal report on procedural grounds are similar to those he proffered to support his challenge to his 2014 staff report, which the Tribunal rejected in Judgment 4257 as unfounded (see, in particular, considerations 12 to 14), they are also rejected as unfounded in this complaint.

13. The complainant raises one other issue of substance by alleging that the establishment of his 2015 appraisal report was vitiated because of his suspicion of partiality or bias on the part of his reporting and countersigning officers. Settled case law has it that the complainant bears the burden to provide evidence of sufficient quality and weight to persuade the Tribunal that his allegations of bias or partiality are well founded (see, for example, Judgments 4543, consideration 8, and 3380, consideration 9). It is also noteworthy that the Tribunal stated, in effect, in consideration 15 of Judgment 4257 (on the complainant's second complaint challenging his 2014 staff report) that, by addressing the complainant's arguments about partiality, the Appraisals Committee had correctly accepted that consideration of whether the staff report was authored by individuals who were partial was a matter comprehended by its role in assessing whether the report was arbitrary or discriminatory.

14. In his objection with the Appraisals Committee challenging his 2015 appraisal report, the complainant referred to his attempts to have his reporting and countersigning officers replaced, a request he made in an email dated 5 February 2016. In that email, the complainant had requested that his reporting officer be replaced due to comments he had made in his 2014 staff report and during a conciliation meeting "showing how personally involved he must [have] be[en]". The complainant had also requested that his countersigning officer be replaced due to reasons he had already communicated in his 2014 staff report (concerning certain statements that officer allegedly made during the conciliation meeting) and in emails of 4 February 2014 and 24 March 2015. In the first mentioned email, the complainant had requested that his countersigning officer be replaced for his 2013 performance appraisal on the basis that he suspected his partiality due to the officer's involvement in incidents that occurred during the reporting period from 1 January to 31 August 2012 in preparation for the staff report covering 2013, in view of statements the said officer had made in the staff report and during the conciliation procedure. In the email of 24 March 2015, the complainant had also requested that the same countersigning officer be replaced for the purpose of his 2014 performance appraisal on the same bases, as well as because of the officer's "arguments" in the

context of his decision to close the Berlin Office where the complainant worked. In a reply of 3 March 2016 to the complainant's email of 5 February 2016, the Principal Director of Human Resources informed him that the request could not be granted as he had not submitted "sufficient grounds to shed any doubts on the [reporting and countersigning officers] neutrality".

15. Also, in his objection with the Appraisals Committee concerning his alleged suspicion of partiality on the part of his reporting and countersigning officers, the complainant referred to the comments they made in his 2014 staff report and in his objection to that report. He also referred to his emails of 4 February 2014, 24 March 2015 and 5 February 2016, as well as his comments in his 2015 appraisal report. In its opinion of 24 June 2016, the Committee concluded that the complainant had provided no substantiation nor reasoning to support his allegation of partiality and that, in any event, the issue had been addressed in the letter sent to him on 3 March 2016 prior to the conciliation meeting.

16. While the Committee could not rely solely on the administrative letter of 3 March 2016 to address the issue of partiality, it was open to it to conclude, in effect, as it did, that the complainant, who bears the burden of proving partiality, did not provide substantiation or reasoning to support that allegation. The Tribunal points out that this case is materially different from that in Judgment 4257, where the Appraisals Committee had limited its consideration of the issue of partiality to the "reporting period in question". There was no such limitation in the Appraisals Committee's report regarding the issue of partiality in the present case. The complainant's plea that his appraisal report was vitiated by partiality on the part of his reporting and countersigning officers is accordingly unfounded.

17. In light of the foregoing, the complaint will be dismissed.

DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 17 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