

J. (No. 6)

v.

EPO

136th Session

Judgment No. 4720

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr P. J. against the European Patent Organisation (EPO) on 9 January 2017 and corrected on 13 January, the EPO's reply of 13 March 2017, the complainant's rejoinder of 30 May 2017 and the EPO's surrejoinder of 12 September 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.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat, since 1990. In his appraisal report for the period covering 1 January to 31 December 2015, received on 31 March 2016, his overall performance was assessed as "acceptable, with some areas of improvement, which have been addressed with the staff member". Disagreeing with the content of his report, he submitted lengthy written comments on 20 April 2016, seeking inter alia that his performance overall marking be assessed as "significantly higher than the level required for the function".

Two conciliation meetings took place on 5 and 10 May 2016, following which the report was slightly amended even though the overall rating remained the same. On 6 June 2016, he raised an objection with the Appraisals Committee challenging the lawfulness of Circular No. 366 and arguing that his performance appraisal was flawed on grounds of error of facts with respect to the achievement of his set objectives. He reiterated his request for a different overall rating.

In its opinion of 22 July 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 27 September 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 order the amendment of his appraisal report for 2015 so that he receives an overall marking of "significantly higher than the level required for the function", to declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal and to repeal Circulars Nos. 355 and 356 insofar as impacting his right to have a fair and objective appraisal report, and a fair and impartial conflict resolution procedure. He further requests that the disagreement on his report be assessed by a true, impartial, quasi-judicial body not only on grounds of "arbitrariness" and "discrimination". He also seeks the award of "real", moral and material damages, as well as costs.

The EPO argues that the complainant's claim aiming at an amendment of his appraisal report is irreceivable as the Tribunal does not have jurisdiction to issue injunctions. Concerning his request for a new assessment by a quasi-judicial body, it contends that such claim amounts to an order to the Organisation to amend its rules, which does not fall within the Tribunal's jurisdiction. As to the claims on the alleged illegality of decision CA/D 10/14, Article 110a of the Service Regulations and Circulars Nos. 355, 356 and 366, it contends that the complainant may only request that the aspects of these general decisions giving rise to an individual implementation be set aside. Moreover, it notes that Circulars Nos. 355 and 356 are immaterial to the present dispute as they govern respectively the Staff Committee elections and the resources and facilities granted to such Committee. The EPO requests that the complaint be dismissed as partly irreceivable and unfounded.

CONSIDERATIONS

1. The complainant challenges his appraisal report for the period 1 January to 31 December 2015, which was established under the new performance appraisal rules that took effect from 1 January 2015. 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.

2. In his 2015 appraisal report, the complainant's reporting officer assessed his overall performance as "acceptable, with some areas of improvement, which have been addressed with the staff member". In his comments to that rating, the complainant stated that his reporting officer never addressed any areas of improvement that he needed to make. He noted that the overall assessment was positive but that the overall rating he received was however below the expected average. He expressed the view that he should have been warned and provided with

advice of what he needed to improve in order to achieve a higher assessment and that an overall rating of his performance as “significantly higher than the level required for the function” would have been much more appropriate. In his objection with the Appraisals Committee, the complainant expressed his disagreement with the aspects of the final version of the 2015 appraisal report and of the conciliation report. He complained that the tight time limits provided in Circulars Nos. 366, 355 and 356 for the conciliation meeting and thereafter the raising of the objection amounted to a denial of justice as they did not provide sufficient time for him to obtain advice and assistance from his staff representatives or from a lawyer in order to adequately defend his case. He also complained that, by limiting the review mandate of the Appraisals Committee to determining only whether the appraisal report was arbitrary or discriminatory, Article 110a(4) of the Service Regulations was unclear and created a legal void which prevented a complete review of an appraisal report, which was another form of denial of justice also limiting the scope of the Tribunal’s power of review.

3. Upon the Appraisals Committee’s recommendations to reject the complainant’s objection and to confirm his 2015 appraisal report, concluding that he provided no evidence, not even arguments, to substantiate that the assessment of his performance was arbitrary or discriminatory, which the Vice-President of Directorate-General 4 (DG4) accepted in the impugned decision, the complainant challenged this latter decision seeking orders, which the Tribunal sets out as follows:

- (1) to amend his 2015 appraisal report so that he receives an overall assessment of his performance of “significantly higher than the level required for the function” instead of “acceptable, with some areas of improvement, which have been addressed with the staff member”;
- (2) to declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal;

- (3) to repeal Circulars Nos. 355 and 356 insofar as impacting his right to have a fair and objective appraisal report, and a fair and impartial conflict resolution procedure;
- (4) to order that his objection to his 2015 appraisal report be determined by a true, impartial, quasi-judicial body (such as the Internal Appeals Committee);
- (5) to order that the review of his 2015 appraisal report be determined on all grounds of illegality and not be limited only to whether it was arbitrary or discriminatory;
- (6) to award him compensation for any “real damage” caused by the impugned decision;
- (7) to award him (aggravated) moral damages of no less than 1,000 euros, particularly for the wilful application of a new defective performance appraisal regulatory regime;
- (8) to award him material damages that he continues to incur, a substantiation of which claim can be submitted at the end of the litigation;
- (9) to award him costs.

4. The EPO submits that the order the complainant seeks in item 1 above is irreceivable because the Tribunal does not have jurisdiction to issue such an injunction. The complainant has however explained that the order which he seeks in that item is not an injunction but a request to the Tribunal to find that his appraisal report and the regulations pursuant to which it was established are illegal. The Tribunal accepts that explanation and will treat it as such, thus rejecting the EPO’s submission.

5. The EPO further submits that the order which the complainant seeks in item 2 above, for an order declaring decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal, is only receivable insofar as he may request that those aspects of them that were individually applied to his 2015 performance appraisal be so declared. This submission is founded on settled case law (see, for

example, Judgment 4563, consideration 7, and the case law cited therein). Accordingly, the complainant may challenge the lawfulness of those aspects of these general decisions as may have applied to establish his 2015 appraisal report.

6. The complainant challenged his 2014 staff report on some of the same grounds raised in these proceedings concerning the general decision preceding it. One matter should be mentioned though it is not raised in the pleas. It is at least arguable that a right to challenge a general decision through a challenge to an individual decision implementing it is not an open-ended and enduring right. The right to challenge the individual decision is subject to ordinary time limits. Accordingly, so is, arguably, the right to challenge the general decision (see Judgment 3614). But as this point was not raised in the pleas, the Tribunal will not address it in detail with a view to considering, *ex officio*, the receivability of this complaint on this basis.

7. The EPO also submits that the order which the complainant seeks in item 3 above to repeal Circulars Nos. 355 and 356 is only receivable insofar as those aspects of these circulars that were individually applied to his 2015 performance evaluation process be concerned. However, as the subject matter of these circulars was unrelated to the establishment of an appraisal report, the order which the complainant seeks in relation to them is irreceivable.

8. As the EPO correctly submits, the order which the complainant seeks in item 4 above, namely that his objection to his 2015 appraisal report be determined by a true, impartial, quasi-judicial body (such as the Internal Appeals Committee), is irreceivable. The Tribunal does not issue such an order.

9. In challenging his 2015 appraisal report on procedural grounds, the complainant submits, in effect, that the new regulatory regime under Circular No. 366 is flawed in that it provides that objections to appraisal reports be reviewed by an Appraisals Committee whose composition is unlawful because it is comprised solely of

representatives of the Administration and chaired by the Head of Human Resources in Principal Directorate 4.3, who is also responsible for the administration of appraisal reports. The complainant also submits that the Appraisals Committee's opinion is flawed as, in violation of the duty to substantiate a decision, its review mandate is limited to determining whether a report is arbitrary or discriminatory. He argues that the EPO thereby intentionally created a legal void which prevents a complete review of an appraisal report taking into consideration all legal grounds. This, he argues, puts him at a significant disadvantage before the Tribunal, amounting to a denial of justice, and is also a violation of the Tribunal's requirement that such objections should be heard by an independent quasi-judicial body similar to the Internal Appeals Committee, which the Appraisals Committee replaced to hear objections to appraisal reports. The complainant further submits that the tight time limits provided in Circular No. 366 for initiating the conciliation procedure after his appraisal report was finally established (twenty days) and subsequently for raising his objection with the Appraisals Committee (ten days) amounted to a denial of justice as it did not provide sufficient time for him to obtain advice from elected staff representatives or for any other assistance to guarantee that he could have defended his case adequately. He argues that this also violated the principle of equality of arms.

10. The foregoing submissions are unfounded given the Tribunal's dismissal of similar submissions in considerations 11 to 13 of Judgment 4637, and in considerations 12 and 13 of Judgment 4257. It follows that the orders which the complainant seeks in items 4 and 5 above are rejected.

11. Regarding the complainant's challenge to the substance of his 2015 appraisal report, it is convenient for the Tribunal to recall 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. Regarding the alleged substantive flaws in his 2015 appraisal report, the complainant’s submission according to which the overall marking which he received lacks proper basis as it does not correspond to his performance in 2015 does not engage the Tribunal’s limited power of review. He has failed to prove his contention that the marking which he was awarded was in breach of a proper procedure and did not benefit from a thorough assessment. These submissions are accordingly unfounded. His reporting and countersigning officers substantiated the markings and the overall rating they awarded to the complainant in his 2015 appraisal report. The Appraisals Committee also fairly substantiated its opinion within the terms of its mandate to determine whether the report was arbitrary or discriminatory.

13. As the complainant is unable to provide 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