

**B. (No. 6)**

*v.*

**EPO**

**136th Session**

**Judgment No. 4723**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Mr F. B. against the European Patent Organisation (EPO) on 7 October 2016, the EPO's reply of 13 March 2017, corrected on 23 March, the complainant's rejoinder of 12 June 2017, corrected on 23 June, and the EPO's surrejoinder of 27 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 working as an examiner and a 50 per cent staff representative at the material time. At the beginning of the reporting period for 2015, several objectives were established regarding the assessment of his performance. In a note dated 7 April 2015, he contested the fixed objectives which, in his view, were not reasonable.

In his appraisal report for the period covering 1 January to 31 December 2015, the complainant's overall performance was assessed as "corresponding to the level required for the function". Disagreeing with the content and the markings contained in his report, the complainant requested that a conciliation procedure be initiated. A meeting took place on 15 April 2016, following which the report was confirmed. On 6 May 2016, he raised an objection with the Appraisals Committee arguing, among other things, that his "core competencies" were not assessed, that the EPO's specific guidelines on performance assessment – namely, the "New PAX Guidelines 2.2", the "Guidance to Performance Assessment of Examiners in [Directorate-General 1 (DG1)]", the "Guidelines for Individual Quality Objective Setting" and the "Functional Competencies for Examiners", which were all published on 22 December 2014 – had not been submitted to the "mandatory" consultation of the General Consultative Committee (GCC), of which he was a member, and that his objectives for 2015 were arbitrarily defined.

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 order the amendment of his appraisal report for 2015 so that he receives an overall marking of "above the level required for the function", to declare decision CA/D 10/14, Article 110a of the Service Regulations, Circular No. 366 and the specific guidelines on performance assessment 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 “discrimination” and “arbitrariness”. He also seeks the award of “real” and “(aggravated) moral damages”, as well as costs.

The EPO argues that the complainant’s claim to amend his appraisal report is irreceivable as the Tribunal does not have jurisdiction to issue injunctions. 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. Finally, it notes that the specific guidelines on performance assessment constitute managerial tools which do not adversely affect the complainant. 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. 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.”

3. The complainant submits that the reporting officer rated three of his six functional competencies (technical and legal analysis, searching and examining) at level 4 (i.e. Master); the other three (deciding, technical writing and arguing and engaging) at level 3 (i.e. Advanced). The overall performance was assessed as “corresponding to the level required for [his] function” as the complainant had performed at the level required, meeting the requirements expected at the relevant level of proficiency in terms of competencies and he had achieved objectives which corresponded to what could normally be expected.

4. In his comments in the report, the complainant expressed disagreement with the evaluation, referring to an email he sent to his reporting and countersigning officers on 14 April 2016, which was the basis of the conciliation meeting held to discuss his 2015 appraisal report pursuant to Section B(11) of Circular No. 366. Therein he argued that the assessment infringed the requirements of Section A(3) of Circular No. 365 (entitled “General Guidelines on the EPO Competency Framework” and entered into force on 1 January 2015), which relevantly states that “[a]ll relevant competencies are to be taken into account for assessment purposes”, and that while his functional competencies were

assessed, none of his “core competencies” were. The complainant repeated this in his objection with the Appraisals Committee.

5. The Appraisals Committee made the recommendations to reject the complainant’s objection and to confirm his 2015 appraisal report, which the Vice-President of Directorate-General 4 (DG4) accepted in the impugned decision.

6. The complainant’s contention that his appraisal report is substantively flawed because none of his “core competencies” was assessed in breach of the EPO’s own rules is well founded. The complainant refers to Sections A(3) and B(1) of Circular No. 365. Section A(3), which relevantly states that, in assessing competency levels, “[a]ll relevant competencies are to be taken into account [...] core and functional competencies for all staff”, imposes a duty on the repository of the power to take into account both core and functional competencies in staff assessments. A similar construction is applicable also to Section B(1), which relevantly states that “[t]he first assessment of competencies of individual staff members (based on the generic profiles) shall take place in parallel to the first mid-term review of the 2015 appraisal cycle”.

7. The complainant alleges, and the EPO admits, that only his functional competencies were assessed during the 2015 appraisal period, as was the case for all other examiners. The EPO however seeks to avoid the consequences of the failure to assess the complainant’s core competencies, required by Section A(3), by asserting that core competencies were not assessed for any examiner in 2015. The EPO references Sections A(3) and A(5)(c) of Circular No. 365, which do not provide exemptions to the requirement that both core and functional competencies of an examiner be assessed. Accordingly, the complainant’s 2015 appraisal report was established in breach of the EPO’s own rule. As a result, the impugned decision and the complainant’s 2015 appraisal report will be set aside and the EPO will be ordered to remove the report from his personal file.

8. In the normal course of events, the matter would be remitted to the EPO ordering that the complainant's 2015 appraisal report be redone. However, it will be impracticable to issue such an order given the effluxion of time. As the complainant provides no basis for the award of "real" damages they will not be awarded. As he has not articulated the injury which the breach has caused him, no "(aggravated) moral damages", as he articulates his claim, will be awarded. However, as he prevails in his claim to set aside the impugned decision and his 2015 appraisal report, he is entitled to costs for which he will be awarded 1,000 euros.

9. The Tribunal notes that the failure in this case to assess core competencies was a systemic failure and applied to the assessment of all examiners in the EPO in 2015. However, this issue has not been raised by other complainants challenging their 2015 appraisal reports considered by the Tribunal at this session, save for one (see Judgment 4724). Other examiners who may have been affected have either not raised the point, as just noted, or not brought proceedings in the Tribunal.

#### DECISION

For the above reasons,

1. The impugned decision dated 8 July 2016, as well as the complainant's 2015 appraisal report, are set aside.
2. The EPO shall remove the appraisal report from the complainant's personal file.
3. The EPO shall pay the complainant costs in the amount of 1,000 euros.
4. All other claims are 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