

K. (No. 12)

v.

EPO

136th Session

Judgment No. 4722

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr T. K. against the European Patent Organisation (EPO) on 2 September 2016 and corrected on 26 September, the EPO's reply of 13 March 2017, the complainant's rejoinder of 10 June 2017, corrected on 24 July, and the EPO's surrejoinder of 30 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 20 March 2015, the complainant – a permanent employee of the European Patent Office, the EPO’s secretariat, since 1991 – received his objectives for the ongoing appraisal period. On 2 April, he submitted his comments on those objectives, with which he agreed while referring to his “comments regarding formal and administrative issues as made to [his] previous staff reports, in particular [those] of the reporting periods 2010-2011, 2012-2013 and 2014”. He stated that those comments were equally made and applicable to the 2015 reporting period. On 16 April, he was informed that his reporting and countersigning officers had taken note of his comments.

On 10 November 2015, the complainant was informed that his appraisal report for the period covering 1 January to 30 November 2015 was available. His overall performance was assessed as “significantly higher than the level required for [his] function”, and he received very laudatory feedback.

Despite his positive appraisal report, on 23 November 2015, the complainant submitted some comments arguing, among other things, that it remained unclear which “exact official post” was taken into account as the basis for drafting his report since relevant information concerning his administrative status and employment situation was lacking from his personal file.

A conciliation meeting took place on 26 November, following which the appraisal report was confirmed “only as far as the box markings and performance related comments [were] concerned” but the issues relating to the complainant’s administrative status remained “unresolved”. On the same day, the complainant was informed that a final version of his appraisal report was available. On 2 December 2015, he raised an objection with the Appraisals Committee reiterating his concern about his employment situation which, in his view, remained unclear, and requested that his report be set aside in its entirety.

In its opinion of 24 June 2016, the Appraisals Committee noted that the complainant’s objection was directed against his administrative status, which he had contested for several years, and that it fell outside its scope of review. It recommended rejecting the objection and

confirming his 2015 appraisal report. 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 his appraisal report for 2015, to declare decision CA/D 10/14, Article 110a of the Service Regulations and Circular No. 366 illegal, 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, and to order that a new assessment of his performance be made by a true, impartial and quasi-judicial body, not only on grounds of “arbitrariness” and “discrimination”. He further seeks an award of moral and punitive damages and costs. He finally requests that the EPO be ordered to rectify the lack of official employment documentation and administrative data in his personal file.

The EPO argues that the complainant has no cause of action, that his complaint is irreceivable insofar as he is challenging general regulations and decisions, or his administrative status, and that most of his claims are either outside the scope of the Tribunal’s jurisdiction, or unrelated to the present dispute, or time-barred. It asks the Tribunal to dismiss the complaint as irreceivable and, subsidiarily, unfounded, and to order that the complainant bear all the costs he has incurred in bringing these proceedings and part of the EPO’s costs in an amount left to its discretion.

CONSIDERATIONS

1. This complaint is the culmination of the complainant’s challenges against his appraisal report for the period 1 January to 30 November 2015. It was drawn up under the provisions of Circular No. 366, which came into effect on 1 January 2015 replacing Circular No. 246.

2. In the complainant’s appraisal report for the subject period, his reporting officer stated that (1) he was on track with all of his

objectives at that point; (2) in terms of competence, he was meeting the required level in all cases and exceeding it in many cases; and (3) in some cases, the proficiency level was not clear enough to properly assess the correct level, which would have to be clarified and the evaluation might need to be amended in the final appraisal. The complainant's reporting and countersigning officers lauded his performance and thanked him for his important contribution and dedication to his work. Whilst in his final comments to the appraisal, the complainant did not comment upon his reporting and countersigning officers' markings and positive comments, he argued that it was still entirely unclear which "exact official post" was taken into account as the basis for drafting the appraisal report. He referred to this as critical unclarified detail which resulted, *inter alia*, in legal uncertainty, and expressed the view that, because of this issue, the appraisal report was neither confirmed nor accepted. Because of his comments, the complainant's reporting and countersigning officers scheduled a conciliation meeting, pursuant to Section B(11) of Circular No. 366.

3. The report of the conciliation meeting, which was signed by the complainant, as well as by his reporting and countersigning officers, stated that it was unnecessary to amend the complainant's appraisal report as he did not object to either the markings or to the performance-related comments in it. It was noted that he had however complained that he was the subject of longstanding unresolved administrative issues, which he had raised in previous reporting exercises, but that he was informed, in effect, that those issues were outside the scope of the reporting exercise. On the complainant's objection with the Appraisals Committee, pursuant to Sections B(12) and B(13) of Circular No. 366, the Committee noted, in its opinion, that his objection to his appraisal report was directed against his administrative status, which he had contested for several years. The Committee reiterated that the reporting exercise was not the appropriate forum to resolve those administrative issues and concluded that it did not fall within its competence to consider the complainant's request, which clearly fell outside the scope of its mandate simply consisting in considering whether the report was

arbitrary or discriminatory. The Committee therefore recommended rejecting the objection and confirming the appraisal report.

4. 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 and the recommendations of the Appraisals Committee. He rejected the complainant's objection, confirmed his appraisal report for the period 1 January to 30 November 2015 and stated that the report would be placed on his personal file, together with a copy of the Committee's opinion. Whilst the complainant asks the Tribunal to set aside the impugned decision and his appraisal report on various grounds, the EPO submits, among other things, that the complaint is irreceivable and should be dismissed because the complainant lacks a cause of action as he has not alleged an adverse effect stemming from the appraisal report and has failed to demonstrate an actual injury which would allow him to succeed on the merits. His claims are focussed on his administrative status.

5. In consideration 8 of Judgment 3739, the Tribunal confirmed its case law which states that, for there to be a cause of action, a complainant must demonstrate that the contested administrative action caused injury to her or his health, finances or otherwise or that it is liable to cause injury. The complainant does not demonstrate that the result of the reporting exercise, which he does not contest, has caused any injury to his health, financially or otherwise, or that it is liable to cause him injury. Accordingly, the complaint is irreceivable and will be dismissed and it is therefore unnecessary to consider the complainant's request for the disclosure of documents.

Moreover, the complainant's administrative status, which is the focus of his objection, is *res judicata* since it has been the subject of a number of internal appeals and complaints he has filed with the Tribunal, some of which have resulted in judgments (see Judgments 4642 and 4640).

6. As to the EPO's counterclaim for costs, the Tribunal is satisfied that a review of the complainant's pleadings alone reflects a

case that obviously had no possibility of success and is frivolous (see Judgment 4025, consideration 11). Accordingly, the Tribunal will order that the complainant pay the EPO the nominal amount of 100 euros in costs within sixty days of the date of the public delivery of this judgment.

DECISION

For the above reasons,

1. The complaint is dismissed.
2. The complainant shall pay the EPO costs in the amount of 100 euros within sixty days of the date of the public delivery of this judgment.

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