

F. (No. 7)

v.

EPO

136th Session

Judgment No. 4726

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Mr S. C. F. against the European Patent Organisation (EPO) on 10 October 2016 and corrected on 24 November, the EPO's reply of 13 March 2017, the complainant's rejoinder of 31 July 2017 and the EPO's surrejoinder of 14 November 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 1987 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 30 March 2015, he raised "justified" suspicions of partiality against his reporting officer that had existed for many years.

On 10 July 2015, during the intermediate review meeting, the complainant was informed by his reporting officer that his productivity was not in line with his objectives and was below what could be expected from him. He was invited to "increase his production accordingly".

On 23 July 2015, the Department of Performance Management pointed out to him that he did not acknowledge receipt of the summary of his performance review meeting. The complainant replied on the same day arguing that his reporting officer should not be involved in the performance appraisal process as he had suspicions on his impartiality and requesting that an individual decision be taken to replace the latter for the purposes of the procedure under Circular No. 366.

At the prior interview meeting on 17 March 2016, the complainant refused to discuss his performance and the content of his appraisal report for the period covering 1 January to 31 December 2015 with his reporting officer. In the said report, his overall performance was assessed as "acceptable, with some areas of improvement, which have been addressed with the staff member".

The complainant requested that a conciliation procedure be initiated. On 5 April 2016, he sought again the replacement of his reporting officer in view of the conciliation meeting.

A meeting took place on 13 March 2016, following which the report remained unchanged. On 20 April 2016, he raised an objection with the Appraisals Committee arguing, among other things, that there were "objectively justified reasons to suspect the reporting officer's and the countersigning officer's partiality", that those reasons were not sufficiently considered and that his work as a staff representative had not been considered at all.

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 these documents be removed from his personal file. He also seeks compensation "for the involved procedural violations, moral damages, financial losses, lost career opportunities", the award of costs and the payment of 8 per cent compound interest on all amounts due.

The EPO notes that the complainant attempts to broaden the scope of the dispute by focusing on the EPO appraisal system as a whole and on the disagreements between him and his line managers rather than on the appraisal report itself. It argues that the complainant's request that the Appraisals Committee's opinion and the appraisal report be removed from his personal file amounts to an injunction which is outside the Tribunal's jurisdiction. As to the claim regarding compensation for "lost career opportunities", it contends that the complainant is not allowed to file claims about a separate and distinct decision, namely his non-promotion for 2016. The EPO requests the Tribunal to dismiss the complaint as partly irreceivable and unfounded. Should the latter decide to set aside the appraisal report, the EPO considers that such ruling would be deemed to afford sufficient redress to the complainant.

In his rejoinder, the complainant readjusts some of his claims by quantifying the amount of compensation for moral damages in the amount of 1,000 euros per month until the disputed documents are removed from his personal file, plus 2,000 euros "for the involved procedural violations and costs", and lowers the percentage of compound interest to 6 per cent. On a subsidiary basis, he further asks the Tribunal to declare the whole appraisal procedure as null and void *ab initio* and, assuming that it cannot take a final decision on the present dispute, to

send the case back to the EPO for an examination involving impartial reporting and countersigning officers and/or a duly composed Appraisals Committee or Internal Appeals Committee as it sees fit. He also seeks compensation in an amount of 4,000 euros “for the procedural delays as well as the involved procedural violations and costs”.

In its surrejoinder, the EPO, considering that the complaint is an abuse of process, makes a counterclaim for costs in an amount to be determined by the Tribunal.

CONSIDERATIONS

1. The complainant impugns the decision, dated 8 July 2016, in which the Vice-President of Directorate-General 4 (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.

2. On the ground that he suspected that his reporting officer was partial, the complainant had objected to that officer’s involvement in his performance appraisal as soon as the process of setting his objectives for his 2015 appraisal period began. In an email of 5 April 2016, the complainant suggested that his reporting and countersigning officers be replaced by someone from outside Directorate-General 1 (DG1). He also requested to be accompanied by an observer, for example from the Staff Committee, to the conciliation meeting. The countersigning officer rejected those requests pointing out, correctly, among other things, that Circular No. 366 did not contemplate the attendance of anyone except the complainant and the reporting officer at that meeting. In his objection with the Appraisals Committee, the complainant

repeated his allegation of suspicions of partiality. He cited various grounds pursuant to Section B(12) of Circular No. 366.

3. Having considered the grounds the complainant put forward as the bases of his suspicions of bias, the Committee concluded that he did not provide any justified evidence to substantiate his allegation of partiality. The Committee also concluded that the complainant's activities as a staff representative could not be taken into account in the appraisal of his performance as no supervision is exercised over such activities and that taking them into account can be seen as an interference with the independence of staff representation. As to the complainant's request to prevent any further attacks on his professional status as an examiner and a staff representative, the Appraisals Committee concluded, correctly, that such a request did not fall within its mandate as it is not a matter that is concerned with the establishment of the complainant's appraisal report. Regarding the overall assessment, the Committee concluded, in effect, that the marking the complainant was awarded seemed to have been based on objective elements, such as the achievement of his objectives, having regard to his expected competencies, experience and grade, and that the given assessment was justified as his performance was well below that which was expected from him. The Committee also noted that the impact of the closure of the Berlin Office was taken into account in the assessment.

4. In challenging the impugned decision and his appraisal report, the complainant seeks a number of orders, which the Tribunal sets out as follows:

- (1) to set aside the impugned decision;
- (2) to declare that his 2015 appraisal report is null and void;
- (3) to declare that the Appraisals Committee's opinion is null and void;
- (4) on a subsidiary basis, to declare that the whole appraisal procedure is null and void *ab initio* (added in his rejoinder);
- (5) to order the EPO to remove the subject appraisal report and the Appraisals Committee's opinion from his personal file;

- (6) if the Tribunal cannot take a final decision on the dispute, to send the case back to the EPO for an examination involving impartial reporting and countersigning officers and/or a duly composed Appraisals Committee or Internal Appeals Committee as the Tribunal sees fit (added in his rejoinder);
- (7) to award him compensation for “procedural violations”, which he quantifies in his rejoinder to 2,000 euros;
- (8) to award him moral damages, which he quantifies in his rejoinder to 1,000 euros per month until the disputed documents are removed from his personal file;
- (9) to award him compensation for “financial losses”;
- (10) to award him compensation for “lost career opportunities”;
- (11) to order that oral proceedings be held pursuant to Article 12, paragraph 1, of the Tribunal’s Rules;
- (12) to order the joinder of this complaint with various other complaints he has filed;
- (13) to award him compound interest of 8 per cent on all amounts due, which he amended in his rejoinder to 6 per cent;
- (14) on a subsidiary basis, to award him compensation in an amount of 4,000 euros for the procedural delays, as well as the involved procedural violations and costs.

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. His request for the joinder of this complaint with various other complaints (in particular, his first, third, fourth, fifth, sixth, eighth, ninth and tenth), in item 12 above, is also rejected as they clearly do not raise the same or even similar issues of fact and law.

6. The complainant’s request, in item 3 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 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 internal appeal.

8. 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.”

9. 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 proffered by another EPO staff member to support his challenge in 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.

10. Regarding the complainant's allegation that his 2015 appraisal report is vitiated because of his suspicions 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). The Tribunal also stated, in effect, in consideration 15 of Judgment 4257, that, by addressing the complainant's arguments about partiality, the Appraisals Committee had correctly accepted that consideration of whether the appraisal report was authored by individuals who were partial was a matter comprehended by its role in assessing whether the report was arbitrary or discriminatory.

11. At the beginning of his intermediate review meeting with his reporting officer, in July 2015, the complainant requested that the meeting not take place because he suspected the partiality of that officer and requested his replacement. He repeated that request on other occasions during 2015 and 2016, including in his written comments to his appraisal report in which he stated that he suspected the partiality of the countersigning officer as well. In his comments, dated 14 April 2016, on the complainant's final appraisal report for the 2015 period, the countersigning officer stated as follows concerning his allegation of partiality: "[t]he issue of partiality has been addressed by a management review in March 2016 whereby it was confirmed that there is from an administration point of view no reason to suspect partiality of [the complainant's] reporting officer and countersigning officer". In his objection with the Appraisals Committee, dated 20 April 2016, the

complainant maintained his allegation of suspicions of partiality against his reporting and countersigning officers. He insisted that the allegation was objectively justified because he had provided sufficient evidence on which to base his suspicions and that, in effect, the decision of March 2016 to which his countersigning officer referred was merely an administrative decision by the Vice-President of DG1. He reiterated that the bases of his suspicions of partiality stemmed from various occurrences concerning his work since 2012 in which he alleged his reporting and countersigning officers were involved.

12. In its report, the Appraisals Committee simply noted that it was explained to the complainant during the conciliation meeting that a management review had been directed against his suspicions of partiality, on which a decision had been issued in March 2016. The Committee then concluded, on analyzing the evidence the complainant proffered to support his allegation of partiality, that he had not provided sufficient evidence to substantiate the allegation. The Tribunal is satisfied that conclusion was open to the Appraisals Committee.

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

14. The EPO's counterclaim for costs will also be dismissed as there is no evidence from which to infer that the complainant filed this complaint in bad faith or that it is frivolous (see, for example, Judgment 4487, consideration 17, and the case law cited therein).

DECISION

For the above reasons,

The complaint is dismissed, as is the counterclaim for costs.

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