

J. (No. 2)

v.

EPO

129th Session

Judgment No. 4258

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr P. J. against the European Patent Organisation (EPO) on 10 June 2014, corrected on 15 July, the EPO's reply of 27 October 2014, the complainant's rejoinder of 3 February 2015 and the EPO's surrejoinder of 11 May 2015;

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 staff report for 2006-2007.

In his staff report for 2006-2007 the complainant's performance was rated "very good" for quality, "good" for productivity, "very good" for aptitude, "good" for attitude, "good" for management ability, and "good" for the overall rating. He considered that the report did not accurately reflect his performance and requested that various comments (referring to a period of sick leave, his application for a vacancy and a degree he had obtained) be deleted or modified and that the box markings for productivity and overall rating be raised to "very good". The reporting officer agreed to some of the complainant's requests, but refused to change the box markings, and the countersigning officer endorsed his views. Following an unsuccessful conciliation procedure, the Vice-President

of Directorate-General 2 (VP2) signed the report, indicating that the box marking for attitude was to be raised to “very good” and that the corresponding comment was to be amended accordingly.

Further to VP2’s decision, the reporting and countersigning officers eventually produced a new staff report, but in the meantime the complainant filed a first internal appeal (RI/110/10) challenging the original report. When he subsequently received the new report reflecting VP2’s decision, he filed a second appeal (RI/17/11). The Internal Appeals Committee (IAC) issued an opinion in December 2013 addressing both appeals. It found that some comments should be removed from the complainant’s staff report and that others appeared under the wrong headings and should therefore be moved. It raised doubts as to the assessment of the complainant’s productivity and management ability and, acknowledging that it had no reliable basis on which to verify these assessments, recommended that they be reviewed by the Office and that the overall rating be adjusted accordingly, if appropriate. It rejected the complainant’s claim for punitive damages but recommended an award of 2,500 euros in moral damages.

By a decision of 25 March 2014, the Vice-President of Directorate-General 4 (VP4), by delegation from the President of the European Patent Office, the EPO’s secretariat, dismissed appeal RI/17/11 as irreceivable on the grounds that it contained the same claims as the earlier appeal (RI/110/10), which he dismissed as unfounded. In his view, the reference to the complainant’s sick leave was not inappropriate, as it was mentioned only in order to provide a chronological context, and not as a factor affecting performance. Nor was it “manifestly erroneous”. VP4 considered that the reference to the complainant’s participation in a selection process was purely factual and reflected the reporting officer’s reasoning, and that there was no reason to move the reference to his degree as it appeared precisely where the IAC had said it should appear. Given that the IAC had been unable to conclude that the assessments of the complainant’s productivity and management ability were erroneous, VP4 saw no reason to review the corresponding box markings, nor, by extension, the overall rating. That is the impugned decision.

The complainant asks the Tribunal to set aside the decision of 25 March 2014, to order the EPO to amend his 2006-2007 staff report, and to award him damages and costs.

The EPO asks the Tribunal to dismiss the complaint as entirely unfounded.

CONSIDERATIONS

1. The complainant was employed, at relevant times, by the EPO. He challenges his staff report for the period 2006-2007. Ultimately, the complainant's overall rating was "good" rather than, as he suggests is appropriate, "very good". In the first iteration of the report the complainant had been rated "very good" for quality, "good" for productivity, "very good" for aptitude, "good" for attitude, "good" for management ability and "good" for the overall rating. The complainant was dissatisfied with these ratings and, in due course, VP2 re-rated attitude to "very good" but did not alter the other ratings. Following an internal appeal, the IAC recommended in its opinion of 20 December 2013 that the report should be referred back to the Administration to review the box markings for productivity, management ability and overall rating. The majority of the IAC proposed the removal of certain comments and the relocation and reformulation of others.

2. The Tribunal recalls that it is well established in the Tribunal's case law that assessment of merit is an exercise that involves a value judgement, signifying that persons may quite reasonably hold different views on the matter in issue. Moreover, because of the nature of a value judgement, the grounds on which a decision involving a judgement of that kind may be reviewed are limited to those applicable to discretionary decisions. Thus, the Tribunal will only interfere if the decision was taken without authority, if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts, if it was taken in breach of a rule of form or procedure, or if there was an abuse of authority (see, for example, Judgments 3006, consideration 7, and 3062, consideration 3, a case likewise concerning

a staff report). Accordingly the role of the Tribunal in challenges to the assessment of the performance of staff of international organisations is a limited one and does not involve reassessment of performance by the Tribunal (see, for example, Judgments 3228, consideration 3, and 3692, consideration 8).

3. The relief identified in the complaint is firstly that the final decision be quashed. This is a reference to the impugned decision of VP4 of 25 March 2014 to reject his appeals in relation to his 2006-2007 staff report. The second element of the relief sought is the amending of the report. The third and fourth elements are damages and costs respectively. Consistent with the case law referred to in the preceding consideration, the Tribunal will not consider amending the complainant's staff report as he proposes. The real issue raised in these proceedings is whether the impugned decision should be quashed or set aside, particularly bearing in mind that it involved a rejection of the recommendations of the IAC.

4. In his pleas, the complainant identifies what he describes as procedural or formal flaws attending the disputed report. There are four. The first and second concern comments in the report referring to periods of sick leave the complainant had taken during the reporting period. These comments are said to be in the wrong place in the report and should only have been made with the agreement of the complainant that was never given as required by the applicable Circular (Circular No. 246). The third concerns comments about an application the complainant had made for a specified position. Again these comments are said to be in the wrong place in the report and were made without informing the complainant as required by the applicable Circular. The fourth concerns a reference in the report to the complainant's qualifications.

5. The complainant's argument concerning the first and second procedural or formal flaws, namely comments in the report referring to periods of sick leave the complainant had taken during the reporting period, are unfounded. The references are intended to identify a point in time only. The complainant's argument concerning the third procedural or formal flaw, namely comments about an application the complainant

had made for a specified position, is also unfounded. It is based on a misapprehension about what Circular No. 246 says about Part V(ii) of the staff report. As the EPO points out, correctly, the provision to which the complainant refers concerns special factors impacting negatively on the staff member's overall performance. The complainant's argument concerning the fourth procedural or formal flaw, namely a reference in the report to his qualifications, is unfounded. The reference was unexceptionable and consistent with Circular No. 246.

6. In addition to what are said to be procedural or formal flaws, the complainant identifies several parts of the report in which, on his account, there was either a mistake of fact or some material fact had been overlooked. Specifically, the complainant challenges the reference to "autumn 2006" in the list of his main or other duties, the reference to his management functions being performed for four months rather than six months, the statement that his "productivity did often not reach the expectations" and the statement that the reporting officer had informed him that his low performance would be mentioned in the staff report. None of these matters bears upon the validity of the report and they are certainly not material errors.

7. In his brief, the complainant also argues there had been an abuse of authority or a mistaken conclusion had been drawn from the evidence. However, in substance, this is a challenge to the assessment made by the reporting officer with which the complainant does not agree. For reasons already explained, it is not for the Tribunal to determine whether the assessment was wrong. The same can be said of the complainant's arguments about the correctness of various specific markings.

8. The final point the complainant makes is that the reasoning of VP4 in the impugned decision is flawed. While his reasons are expressed with considerable economy, VP4 does explain why his approach differed from that of the IAC. It may be accepted that the expression "manifestly erroneous" used by VP4 in the impugned decision and criticised by the complainant, is probably inapt. But, in context, the expression almost certainly means that if there was an error, it was not a material one. This reasoning was open to the Vice-President.

9. The complainant has not established any ground for setting aside his 2006-2007 staff report and, accordingly, no basis for an award of damages or costs. His complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 23 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ