Reports of Cases

JUDGMENT OF THE EUROPEAN UNION CIVIL SERVICE TRIBUNAL (Single Judge)

10 December 2015*

(Civil service — Officials — Appraisal — Appraisal report — Request for amendment — Refusal)

In Case F-17/15,

ACTION brought under Article 270 TFEU, applicable to the EAEC Treaty pursuant to Article 106a thereof,

Arnulf Jäger-Waldau, an official of the European Commission, residing in Laveno (Italy), represented by D. Fouquet, lawyer,

applicant,

v

European Commission, represented initially by J. Currall and G. Berscheid, acting as Agents, and subsequently by G. Berscheid, acting as Agent,

defendant,

THE CIVIL SERVICE TRIBUNAL (Single Judge),

Judge: K. Bradley,

Registrar: P. Cullen, Administrator,

having regard to the written procedure and further to the hearing on 15 October 2015,

gives the following

Judgment

1 By application received at the Tribunal Registry on 2 February 2015, Mr Jäger-Waldau brought the present action seeking, essentially, the annulment of his appraisal report in respect of the period from 1 January to 31 December 2013 in so far as it contains a sentence he contests.

* Language of the case: English.

Legal framework

2 The present case arises in the legal context of Article 43 of the Staff Regulations of Officials of the European Union ('the Staff Regulations' and Commission Decision C(2013) 8985 final of 16 December 2013 laying down general provisions for implementing Article 43 of the Staff Regulations ('GIP 43'), applicable to appraisal reports drawn up as from the 2014 appraisal exercise.

Facts

3 The applicant is an official in grade AD 12 at the Joint Research Centre (JRC) in Ispra (Italy).

4 In the context of the 2014 annual appraisal exercise relating to 2013, the applicant attended an interview with his reporting officer on 12 February 2014.

5 The applicant's appraisal report for the 2014 exercise ('the appraisal report') was signed by the reporting officer on 1 March 2014. That report contains the following sentence ('the contested sentence'):

'[The applicant] would need to interact more with his [head of unit] about his wide range of external engagements, and give subsequently more priority to tasks important for the Unit.'

6 On 7 March 2014, the applicant appealed against the appraisal report, in accordance with the procedure provided for in Article 7 of GIP 43, requesting, inter alia, that the contested sentence be removed.

7 On 13 March 2014, the applicant attended an interview with the appeal assessor.

8 On 7 April 2014, the appeal assessor confirmed the applicant's appraisal report, and added the following sentences on page 8 under the heading 'Motivation':

'During the dialogue I had with [the applicant], I encouraged him to consider the comments in his [appraisal report] as a proposal for self-improvement and development. They should not be considered as criticism. Further I have asked the [reporting officer] to have a … dialogue with [the applicant] to clarify the point'.

9 On 3 July 2014, the applicant brought a complaint under Article 90(2) of the Staff Regulations against his appraisal report, in so far as it contains the contested sentence. That complaint was rejected by decision of the appointing authority of 31 October 2014 ('the decision rejecting the complaint').

Forms of order sought and procedure

10 The applicant claims that the Court should:

— annul the decision rejecting the complaint;

— order the Commission to adopt a new decision in that case, in accordance with the Tribunal's findings, and in particular remove the contested sentence from the appraisal report;

— order the Commission to pay the costs.

11 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

12 The proposal made by the Judge-Rapporteur to the parties for an amicable settlement of the dispute was unsuccessful.

13 By decision of 28 September 2015, the parties having been heard, the second Chamber of the Tribunal, to which the case was assigned, unanimously decided, under Article 15 of the Rules of Procedure, that the case would be determined by the Judge-Rapporteur sitting as a single Judge.

Law

Claim seeking that the Tribunal order the Commission to adopt a new decision

14 According to settled case-law, the Tribunal, in the context of an action brought under Article 91 of the Staff Regulations, has no jurisdiction to issue directions to EU institutions (judgment of 14 September 2010 in *Da Silva Pinto Branco* v *Court of Justice*, F-52/09, EU:F:2010:98, paragraph 31 and the case-law cited).

15 Consequently, the claim seeking that the Tribunal order the Commission to adopt a new decision must be rejected at the outset as inadmissible.

Claim for annulment of the decision rejecting the complaint

16 The Tribunal notes that an action brought by a member of staff which is formally directed against the implied or express rejection of a complaint has the effect of bringing before the Tribunal the act adversely affecting the applicant against which the complaint was lodged (judgment of 29 June 2010 in *Knöll* v *Europol*, F-44/09, EU:F:2010:68, paragraph 40 and the case-law cited).

17 Consequently, the claims formally directed against the decision rejecting the complaint must be regarded as, in fact, seeking the annulment of the appraisal report, to the extent that it contains the contested sentence.

18 In support of its claim, the applicant raises three pleas alleging (i) breach of the principle of equal treatment between officials, (ii) breach of the principle of proportionality and (iii) breach of the principle of good faith.

19 At the hearing, the applicant withdrew the third plea, on which it is therefore unnecessary to rule.

The first plea, alleging breach of the principle of equal treatment

– Arguments of the parties

20 The first plea comprises two complaints.

21 By his first complaint, the applicant submits that the interview with the reporting officer, initially planned to take place on 12 February 2014 from 13:45 to 14:45, began later than planned and was interrupted, with the result that it lasted no more than 15 minutes. The applicant notes that, according to the general practice in his unit, the interview should have lasted one hour.

22 The applicant submits that that fact indicates that the principle of equal treatment was infringed since he was not given an interview of the same duration as those of his colleagues.

23 By his second complaint, the applicant claims that at no time during the interview did the reporting officer make any reference to the supposed lack of interaction with his head of unit, nor to the need to prioritise more in accordance with the interests of the unit. The applicant therefore considers that he was treated differently from his colleagues, who received a full interview covering all aspects of their professional performance.

24 Moreover, according to the applicant, even though, during his interview with the appeal assessor, he had the opportunity to discuss some points for improvement indicated by the reporting officer, that cannot remedy the 'presumption of discrimination' because he was required to 'go through extra efforts' owing to the fact that he was refused the opportunity to comment on the contested sentence during the interview with the reporting officer.

25 Finally the applicant submits that, in accordance with GIP 43, the appeal assessor may not draw up a new appraisal report, since his powers are limited to confirming that report or amending it, giving reasons, and that, in any event, there is 'natural reluctance' on the part of appeal assessors to amend appraisal reports drawn up by reporting officers.

26 The Commission contends that the Tribunal should reject the first plea as in part inadmissible, since the question of discrimination was not raised in the complaint, and in part unfounded.

– Findings of the Tribunal

27 It should be noted that the principle of equal treatment and the principle of non-discrimination as recognised in EU law oblige administrative authorities not to treat the same situations differently and not to apply the same treatment to different situations, unless that is objectively justified (judgment of 27 September 2011 in *Whitehead* v *ECB*, F-98/09, EU:F:2011:156, paragraph 108).

28 As regards the first complaint, it must, first, be noted that the applicant merely indicates that all appraisal interviews were planned to last one hour, without providing any evidence of the duration of those interviews, either as they had been scheduled or in fact took place, or the practice which he claims was followed in the unit where he works. It follows that the applicant has not provided any proof of the discrimination of which he considers himself to have been a victim and that the present complaint must be rejected.

29 In any event, even if the applicant's interview was, in fact, shorter than those of his colleagues, such a fact could not, in itself, demonstrate the existence of any discrimination against the applicant.

30 The content and, accordingly, the duration of an interview with the reporting officer may vary in accordance with the difficulties of each case to be examined (see, by analogy, in relation to oral tests in a competition, judgment of 30 November 2005 in *Vanlangendonck* v *Commission*, T-361/03, EU:T:2005:433, paragraph 39 and the case-law cited). In that respect, the length of the interview of an official whose professional performance is assessed relatively positively by his superiors, as the appraisal report shows is the case for the applicant, will not be comparable to the length of the interview of an official whose performance raises a number of issues.

31 It follows that the first complaint must be rejected as unfounded.

32 As regards the second complaint, it should be noted that the appraisal report clearly shows that the contested sentence was indeed discussed by the applicant and the appeal assessor at their interview on 13 March 2014.

33 In those circumstances, it must be held that the interview with the appeal assessor remedied any irregularity caused by the fact that the contested sentence was not discussed during the interview with the reporting officer.

34 That finding cannot be undermined by the applicant's arguments that the appeal procedure could not remedy the irregularities on the part of the reporting officer because of the 'extra efforts' that the launch of such a procedure required of him and the limits of the appeal assessor's powers.

35 The applicant's claim would have the effect of depriving the appeal procedure provided for in Article 7 of GIP 43 entirely of its purpose, which is precisely to remedy, if need be, irregularities or errors of assessment on the part of the reporting officer. Furthermore, the applicant has provided no evidence whatsoever concerning the existence of the alleged 'natural reluctance' of assessors to amend appraisal reports, with the result that the arguments put forward in that regard are pure speculation.

36 The second complaint must therefore also be rejected and the first plea dismissed as in any event unfounded, without it being necessary to examine its admissibility in the light of the rule of correspondence between the action and the prior complaint.

Second plea, alleging breach of the principle of proportionality

– Arguments of the parties

37 By his second plea, the applicant submits, in essence, that the conduct of the appeal procedure infringed the principle of proportionality.

38 First, according to the applicant, the contested sentence is 'an extremely negative statement' which gives a 'bad impression' of his performance at work and the fact that the appeal assessor neither amended nor removed it is not an 'appropriate remedy'. Notwithstanding the reasons given by the appeal assessor in his decision confirming the appraisal report as drawn up by the reporting officer, the contested sentence could still be understood, by a third party reading the appraisal report, as 'very negative', which would require the applicant to provide explanations in that respect.

39 Next, the applicant criticises the Commission over the fact that his reporting officer never acted on the recommendation of the appeal assessor 'to have a … dialogue with [him] to clarify this point'.

40 The Commission contends that the second plea should be rejected.

– Findings of the Tribunal

41 As the Tribunal noted in paragraph 8 of the present judgment, the appeal assessor added some sentences to the appraisal report encouraging the applicant to consider the comments therein as 'a proposal for self-improvement and development' rather than a criticism.

42 Those sentences, which are completely unambiguous and appear on the last page of the appraisal report, are sufficient to clarify the scope of the contested sentence in the event of a third party's reading the appraisal report.

43 Moreover, the appeal assessor clearly confirmed the appraisal report, which implies that he accepted the contested sentence, along with all the remarks made by the reporting officer.

44 In those circumstances, given the very wide discretion which assessors are recognised as having when appraising the work of persons upon whom they must report, in order to challenge the appraisal report, the applicant would have had to prove that there was a procedural irregularity, that the facts were not materially correct or that there was a manifest error of assessment or misuse of powers (judgment of 29 September 2009 in *Wenning* v *Europol*, F-114/07, EU:F:2009:130, paragraph 111), which he made no attempt to do.

45 As regards the reporting officer's failure to act on the appeal assessor's recommendation 'to have a … dialogue with [the applicant] to clarify this point', it should be noted that such a dialogue could have taken place only after the appraisal report was adopted. It follows that the absence of such a dialogue cannot have any effect on the validity of the appraisal report.

46 It follows that the second plea must be dismissed as unfounded.

47 For the sake of completeness, it should, moreover, be noted that in his complaint the applicant stated that, during the interview on 13 March 2014 with the appeal assessor, that assessor stated that the reporting officer's comments should be regarded as a 'positive criticism' to improve his performance. Furthermore, the applicant argued that it was in his interest that the contested sentence be removed from his appraisal report since, even though the 'explanations [of the appeal assessor] on this point ... might be understandable', the fact that they were not 'laid down in writing,' meant that '... no third person would have an indication of [the] intended interpretation [of the appeal assessor]'.

48 However, it should be noted that the 'explanations of the appeal assessor' do in fact appear on the eighth and final page of the appraisal report, as the applicant himself acknowledged at the hearing, so that the applicant had no interest, even at the stage of the complaint, in requesting that the written remarks of the appeal assessor on the contested sentence be added to the appraisal report because they were already there.

49 The action must accordingly be dismissed in its entirety.

Costs

50 Pursuant to Article 101 of the Rules of Procedure, subject to the other provisions of Chapter 8 of Title 2 of those Rules, the unsuccessful party is to bear his own costs and is to be ordered to pay the costs incurred by the other party if they have been applied for in the other party's pleadings. Under Article 102(1) of those rules, if equity so requires, the Tribunal may decide that an unsuccessful party is to bear his own costs, but is to pay only part of the costs incurred by the other party, or even that he is not to be ordered to pay any costs.

51 It is apparent from the reasons set out in the present judgment that the applicant has been unsuccessful. Furthermore, in its submissions the Commission has expressly claimed that the applicant should be ordered to pay the costs. Since the circumstances of the present case do not warrant application of Article 102(1) of the Rules of Procedure, the applicant must bear his own costs and be ordered to pay the costs incurred by the Commission.

On those grounds,

THE CIVIL SERVICE TRIBUNAL (Single Judge)

hereby:

1) Dismisses the action.

2) Declares that Mr Jäger-Waldau shall bear his own costs and orders him to pay the costs incurred by the European Commission.

Bradley

Delivered in open court in Luxembourg on 10 December 2015.

W. Hakenberg
Registrar

K. Bradley
Judge