H. (Nos. 20 and 21)

v.

EPO

125th Session **Judgment No. 3968**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twentieth complaint filed by Ms E. H. against the European Patent Organisation (EPO) on 21 July 2014 and corrected on 22 August 2014, the EPO's reply of 7 January 2015, the complainant's rejoinder of 11 May, corrected on 18 May, the EPO's surrejoinder of 21 August 2015, the complainant's additional submissions of 12 October 2016 and the EPO's final comments of 9 February 2017;

Considering the twenty-first complaint filed by the complainant against the EPO on 11 September 2014 and corrected on 6 October 2014, the EPO's reply of 26 January 2015, the complainant's rejoinder of 18 May and the EPO's surrejoinder of 21 August 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 the decision to impose on her the disciplinary measure of downgrading for serious misconduct, and the decision not to initiate an investigation into her allegations of institutional harassment.

In May 2012 an employee of the European Patent Office, the secretariat of the EPO, committed suicide. On 5 June the Munich local section of the Staff Union (SUEPO) and the Munich Staff Committee wrote a letter to the President of the Office requesting an independent investigation of the circumstances at work that might have contributed to the suicide. On 12 June the complainant, who was a permanent employee and a staff representative, forwarded a copy of that letter to 18 people who were on a SUEPO "distribution list". In the cover email she explained that many people believed that the behaviour of Mr A. – the previous manager of the deceased – and the "unfounded attacks" by the former Principal Director of Human Resources had contributed significantly to their colleague's death. She added that although solutions had been found to some of the problems within the Principal Directorate, it appeared that the deceased had not managed to "find his balance" again, and that they "hope[d] that this letter [would] contribute to an internal discussion and maybe some lessons [would] be learnt". The complainant's email was circulated beyond the intended list of addressees.

On 21 June the Head of Office of the Vice-President of Directorate-General 4 wrote to the complainant informing her that her recent statements had created some unrest among colleagues. She stated that the Vice-President of Directorate-General 4 (VP4) would like to meet her and discuss ways forward. They met the following day. The complainant and VP4 agreed that she would write an email to the recipients of the email of 12 June finding an appropriate way to withdraw her accusations. She did so on 26 June, explaining that her initial email aimed at achieving reflection and at learning lessons. She added that she did not want to contribute to what she described as a "blame culture". In a letter of 13 July 2012, VP4 took note of her email, stating that although personal apologies would have been more appropriate, he hoped that her email of 26 June would close this "series of declarations". Mr A. read the email of 12 June upon his return from leave on 25 June. He then went on sick leave.

On 7 December 2012 Mr A. wrote to the President requesting the "initiation of proceedings under the staff dignity provisions" of the Service Regulations for permanent employees of the Office on the grounds that the email of 12 June 2012 had injured his dignity. The Investigative Unit (IU) investigated his allegations in accordance with Circulars Nos. 341 and 342 and heard several employees, including the complainant. It issued its report on 23 July 2013, concluding that the email of 12 June was humiliating and degrading for Mr A. and created an intimidating and hostile working environment. Moreover, it had caused significant damage to Mr A.'s health. The IU concluded that the complainant's conduct constituted harassment as defined in Circular No. 341, violated Article 3(2) of the Guidelines on the use of the electronic communications system as well as Article 14(1) of the Service Regulations, and was incompatible with the standards of integrity and truthfulness expected of a civil servant pursuant to Article 5(1) of the Service Regulations. It therefore recommended that disciplinary proceedings be initiated against the complainant.

On 2 August 2013 the President informed the complainant that he had decided to initiate disciplinary proceedings pursuant to Article 100 of the Service Regulations. The matter was referred to the Disciplinary Committee, which, after having held hearings, issued its report on 28 January 2014. The Committee considered that, by his letter of 13 July 2012, VP4 had definitively closed the case. It therefore recommended that the disciplinary proceedings against the complainant be closed and that she be reimbursed her legal costs.

On 25 February 2014 the President notified the complainant that he had decided to impose on her the disciplinary sanction of downgrading to grade A3, step 13, with effect from 1 March 2014, as he considered that she had committed serious misconduct. He explained that he could not follow the recommendation of the Disciplinary Committee as it was tainted with errors of fact and law.

The complainant requested a review of that decision on 28 February 2014. By a letter of 25 April 2014 the President rejected her request as unfounded. In accordance with the applicable provisions, on 21 July 2014

the complainant filed her twentieth complaint with the Tribunal, impugning the decision of 25 April 2014.

In the meantime, on 20 January 2014, the complainant wrote to the President alleging institutional harassment. She contended in particular that the IU was biased and that its report was tainted by many errors. She requested that the disciplinary proceedings be stopped or, in the alternative, that they be stayed pending an investigation by an external ombudsperson into her allegations.

Having received no reply, on 14 April 2014 the complainant filed a request for review of the implied rejection of her request of 20 January. On 13 June 2014 the President rejected the request for review of 14 April as irreceivable. He considered that the claims relating to the disciplinary proceedings were moot as the complainant had been notified of the disciplinary measure imposed on her and had filed a request for review of that decision before filing the request for review of 14 April. The final decision on the disciplinary proceedings was sent to her on 25 April 2014. Moreover, as her request for a counter-investigation into her allegations of institutional harassment related exclusively to the investigation and the disciplinary proceedings, the President considered that it should be dealt with in the context of a challenge to the decision taken at the outcome of the request for review filed against the disciplinary measure imposed on her. That is the decision she impugns in her twenty-first complaint.

In her twentieth complaint, the complainant asks the Tribunal to set aside the impugned decision of 25 April 2014, as well as the President's earlier decision of 25 February 2014, and to order the EPO to pay her the salary and benefits that were deducted pursuant to her downgrading – that is to say the difference between the salary and benefits she actually received from 1 March 2014 and those she would have received since that date had she not been downgraded from grade A4, step 13, to grade A3, step 13 – with interest at the rate of 5 per cent. She claims moral damages as well as an award of costs in respect of both the proceedings before the Tribunal and the proceedings before the Disciplinary Committee.

In her twenty-first complaint the complainant asks the Tribunal to set aside the impugned decision of 13 June 2014 and to award her moral and material damages. She seeks an award of costs (including translation costs) both for the proceedings before the Tribunal and the internal proceedings.

The EPO asks the Tribunal to dismiss the twentieth complaint as unfounded. It further asks the Tribunal to dismiss the twenty-first complaint as irreceivable, on the grounds that that complaint duplicates the claims presented in the complainant's twentieth complaint and is not directed against a final decision. Subsidiarily, the EPO argues that the twenty-first complaint is unfounded.

CONSIDERATIONS

1. On 12 June 2012 the complainant forwarded to 18 people on a SUEPO distribution list, a copy of the letter written on 5 June 2012 by the Munich local section of the SUEPO and the Munich Staff Committee to the President (requesting an independent investigation of the circumstances at work that might have contributed to the suicide of an EPO employee in May of 2012) along with a cover email she wrote. In her cover email she stated inter alia as follows:

> "[...] most of us believe that the behaviour of [the deceased staff member's] (previous) manager and the unfounded attacks by PD4.3 (culminating in a disciplinary procedure) have contributed significantly to his death. [...] Formally the Office will of course deny any guilt. But we hope that this letter will contribute to an internal discussion and maybe some lessons will be learnt."

The email was circulated beyond the 18-person mailing list and reached an unknown number of staff members, including the two previous managers (in particular Mr A.) of the deceased staff member.

2. In an email dated 21 June 2012, the Head of Office of VP4 informed the complainant that her "recent public statements ha[d] created some unrest among the colleagues, managers concerned and staff members alike" and that VP4 would like to meet with her "in order to discuss with [her] the ways forward and how to avoid any further escalation".

3. The complainant sent another email on 26 June 2012 to the same mailing list following a meeting on 22 June 2012, between the complainant, VP4, and the Head of VP4's Office, in which the complainant was informed that the email she had sent on 12 June was defamatory, would damage the reputation of the concerned managers, lead to social unrest, and contribute to the deterioration of working conditions in the Office. In that email of 26 June she wrote:

> "It appears that the below mail has been distributed outside the intended circle and further polarised an already difficult situation.
>
> As most of us agree we have in this Office a 'blame culture'. Problems tend to be analysed with the aim of attributing blame and punishment, rather than solved. I do not wish to contribute to this culture.
>
> As indicated in the mail below, the attached letter was written with the aim of achieving reflection on all sides and hoping that some lessons would be learnt.
>
> In this respect my comment pointing at two individuals was inconsistent and counterproductive.
>
> I regret this."

4. VP4 wrote to the complainant on 13 July 2012, referring to their earlier meeting and stating inter alia:

> "I understand that considering your support and commitment to our deceased colleague, his death had a particular impact on you. I explained to you that even under these circumstances, your behaviour remains unacceptable. Nevertheless, in order to appease an already difficult situation, I did not want to escalate the situation and we agreed that you would find an appropriate way to withdraw your accusations.
>
> Consequently, you wrote to the same group of persons by e-mail on 26th June 2012 to apologize for your first email, in which you qualified your behaviour as 'inconsistent and not productive'. Even if personal apologies to the accused persons would have been more appropriate, I take note of this development and hope that it will close this series of declarations, which were not suited to the particular circumstances."

5. Upon returning from leave on 25 June 2012, and after reading the 12 June email, Mr A. sent an email to the members of his department and his line manager which reads:

> "Dear colleagues, today was my first day back at work after leave, and I have heard from several sources that written and verbal information

> circulating in the Office makes me personally responsible to a significant extent for the death of [the deceased staff member].
>
> Never in my entire life have I encountered anything more repulsive than this filthy smear campaign.
>
> I am totally shocked and feel incredibly sad and empty.
>
> I shall take legal action against this malicious defamation.
>
> I too am protected by the EPO's rules on staff dignity and, as a citizen of the European Union, by the Declaration of Human Rights."

He then went on sick leave and, after over a year of absence, a Medical Committee established his invalidity and he never returned to service.

6. On 7 December 2012 Mr A. wrote to the President requesting the "initiation of proceedings" against the complainant under the provisions of the Service Regulations relating to staff dignity, on the grounds that the complainant's email of 12 June 2012 had "crushed [his] dignity as an EPO employee and as a human being".

7. In its report dated 23 July 2013, the IU concluded that the complainant had "intentionally sent out to a number of people a communication which had the effect of humiliating or degrading Mr [A.], and that this behaviour was perceived as unwelcome by Mr [A.] and caused him serious health damages, and, furthermore, contributed to creating an intimidating, hostile or offensive work environment". It deemed her conduct to constitute harassment towards Mr A. pursuant to Circular No. 341; to be in breach of Article 3(2) of the Guidelines on the use of electronic communications system; to be in violation of Article 14(1) of the Service Regulations; and to be incompatible with the standards of integrity and truthfulness expected from a civil servant as per Article 5(1) of the Service Regulations. The IU therefore recommended:

> "87. IU has established that the allegations against [the complainant] regarding harassment are founded and proven. In accordance with Art. 16(1)(a) of Circ. 341, a decision from the President is requested to confirm whether these allegations are founded.
>
> 88. Notwithstanding the fact that no immediate disciplinary measures were taken against [the complainant] (further to the letter of VP4 of 13.07.12 aimed at re-establishing the social peace and issued before the damaging

> effects of the email sent by [the complainant] on 12.06.2013 [sic] were known in all their very serious subsequent implications), the IU recommends that a disciplinary procedure is initiated according to Art. 100 ServRegs concerning [the complainant].
>
> 89. Furthermore, it is recommended that [the complainant] and other staff members in similar circumstances in the future are encouraged to take part in a coaching aimed at helping them to cope with the emotional distress caused by the suicide of a colleague.
>
> 90. The case is therefore submitted to the President for decision and consideration of the recommended measures and disciplinary proceeding, as per Art. 16 (1) of Circ. 341."

8. The President informed the complainant, by letter dated 2 August 2013, that he had decided to endorse the conclusions of the IU and to initiate disciplinary proceedings. The Disciplinary Committee, in its report dated 28 January 2014, recommended that the President close the disciplinary proceedings and order the payment of the complainant's legal fees. The Disciplinary Committee based its decision on the grounds that: (a) the definition of harassment in Circular No. 341 (Article 10) was not applicable to the case, as the substantive provisions of Circular No. 286 were in force at the material time and should be applied to the facts; (b) Article 93(3) of the Service Regulations stipulates that "[a] single offence shall not give rise to more than one disciplinary measure", and VP4's letter of 13 July 2012 was seen "as an unequivocal declaration by the vice-president in charge of HR matters that the investigations and the consideration of further disciplinary action beyond the written disapproval of the subject's conduct set out in the same letter were to be definitively terminated"; (c) Mr A.'s persisting sickness did not justify resuming investigations against the complainant, nor could the fact that Mr A. had filed a complaint of harassment against the complainant be used to justify reopening proceedings. The Disciplinary Committee added further considerations, namely that the complainant, "acting in her capacity as a member of the SUEPO Executive Committee", informed the contact people on the mailing list of the opinion – widely held amongst the members of that Committee and of the Staff Committee – on the situation, with the purpose of contributing to an internal discussion, and not as a personal

accusation against Mr A., and as such her remark was covered under the right to freedom of expression under Article 10 of the European Convention on Human Rights; that the complainant could not have anticipated that the email would have been forwarded beyond the distribution list; and that the Disciplinary Committee found it hard to understand how the email could be the only reason for Mr A.'s illness.

9. In a letter dated 25 February 2014 the President informed the complainant that he had concluded that she had failed to comply with her obligations under the Service Regulations, which qualified as serious misconduct, and that she had breached the respective rules for electronic communications. As aggravating circumstances he noted: her "persistent and continuous refusal to apologize to Mr A. despite the above admitted effect on his dignity and reputation and the repeated recommendations of the occupational health physician"; that she had appeared to raise publicly and with recklessness, very serious allegations against a person she hardly knew and to whom she did not give a chance to state his views; and her "seniority at the Office, as well as [her] direct participation, as staff representative, to working groups on conflict resolution, to the Committee for Occupational Health, Safety, Ergonomics and Working Conditions, to the Disciplinary Committee, to the Central and local staff committees", which led the Office to expect a "much higher level of sensitivity and care towards [her] colleagues". He therefore decided, "after careful consideration of the whole file", to impose the disciplinary sanction of downgrading to grade A3, step 13, under Article 93(2)(e) of the Service Regulations with effect from 1 March 2014.

10. In the justification for the decision, the President wrote: "I have carefully assessed the recommendation of the disciplinary committee and I regret to conclude that many aspects of the procedure followed by the Committee and its subsequent findings and recommendations are questionable." He considered the Disciplinary Committee had erred in fact and in law and had thus committed manifest errors of appraisal. With regard to the procedure, he objected to the fact that "the drawing of lots [for the composition of the

Disciplinary Committee] was arranged in presence of one party only (the sole alleged harasser, i.e. without the presence of representatives of the Office) and a first hearing was scheduled by the Chairman out of the statutory deadlines", and "the hearing was not tape recorded contrary to a long-standing practice". Regarding the findings and recommendations of the Disciplinary Committee, the President found that the Disciplinary Committee had totally disregarded the IU report concerning the veracity and seriousness of the facts and that the complainant had acknowledged that it was "to be expected" that "Mr A. would feel highly offended" and therefore acted knowingly. The President maintained his position that the IU had rightly qualified the facts in question as harassment under Circulars Nos. 341 and 342, and that in any case those facts fell under Article 93(1) of the Service Regulations (according to which "[a]ny failure by a permanent employee or former permanent employee to comply with his obligations under the Service Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action"). The President disagreed with the Disciplinary Committee's opinion that VP4 had suspended the disciplinary proceedings. He wrote, inter alia, "[o]nly the appointing authority may decide to initiate disciplinary proceedings. Since no proceedings have ever been initiated by VP4, one cannot follow the Committee's reasoning regarding the alleged suspension. Only one week after [the complainant's] e-mail, VP4 had neither investigated the case nor heard the victims of [the complainant's] misconduct nor inquired into any other aspects which could have been material for the case." The President also responded to the Disciplinary Committee's "further considerations", noting that the complainant was responsible for writing the offending email and took no measures to secure its confidentiality. He also noted that the Disciplinary Committee had erred in referring to the complainant as a member of the Staff Union and as a staff representative as she was not one at the material time, and in any case, he pointed out that freedom of speech does not allow staff representatives or union members to severely harm another person's dignity and reputation with impunity. Finally, he stated that the Disciplinary Committee had acted *ultra vires* in challenging, "without supportive evidence nor asking for a counter-expertise, the statements

of the Occupational Health physician on the link between the long and serious sickness of Mr A., and [the complainant's] act".

11. The complainant requested a review of that decision on 28 February 2014, but did not state the grounds on which she was making such a request, beyond referring to the Disciplinary Committee's report ("P1. see unanimous recommendation disciplinary committee"). The President rejected her request as unfounded and communicated that decision to her by letter dated 25 April 2014. In his justification he noted inter alia that the complainant had not raised any argument to support the view that the challenged decision should be set aside, nor had she substantiated her claim that the decision was tainted with abuse of power. He reiterated that VP4's communication of 13 July 2012 did not preclude the initiation of disciplinary proceedings.

12. The complainant filed her twentieth complaint on 21 July 2014 against the President's decision dated 25 April 2014, rejecting as unfounded her request for review of the decision to downgrade her to grade A3, step 13, following disciplinary proceedings.

13. The complainant submits the following grounds in support of that complaint:

(a) the Disciplinary Committee's opinion was correct and based on a fair and thorough analysis of the facts and the President's criticism of the findings is without merit;

(b) the EPO waited until the entry into force of Circular No. 341 so that it could apply the new definition of harassment to the case against the complainant, which breached the principles of legal certainty and non-retroactivity;

(c) VP4 had the delegated authority to bring disciplinary proceedings and had clearly decided not to initiate disciplinary proceedings after having taken into consideration all aspects of the case;

(d) the IU made an erroneous assessment of the situation, distorted important facts in its report and failed to consider evidence supplied by the complainant;

(e) the President's failure to take account of the complainant's emotional state as a mitigating factor showed malice and bad faith;

(f) it was "the circulation of the e-mail outside the privileged recipients by [Ms B.] and [Ms S.] that caused harm to [Mr A.]";

(g) the email did not contain anything which would offend the dignity or the personal honour of Mr A.;

(h) the allegation that Mr A.'s illness was caused solely by the complainant's email is clearly absurd;

(i) the President failed to follow "reasonable standards of evidence";

(j) the disciplinary sanction was disproportionate to the alleged offence; and

(k) the President drew blatantly wrong conclusions from the material available to him, abused his power, and acted with malice and bad faith.

14. The complainant filed her twenty-first complaint on 11 September 2014 against the President's decision dated 13 June 2014, rejecting her 14 April 2014 request for review (of VP4's implicit rejection of her 20 January 2014 claims) as irreceivable. Under the heading "Rationale", the President wrote that the complainant had not presented any argument in support of her request, but rather had only referred to her lawyer's letter, dated 20 January 2014, requesting the termination of the pending disciplinary proceedings or alternatively, that an external Ombudsman carry out the investigation. He noted that her request was moot, because prior to filing her request for review she had already been notified of the disciplinary measure which had been imposed on her following the conclusion of the disciplinary proceedings and in fact had requested a review of that disciplinary measure. He went on to note: "the claims and arguments raised in the letter dated 20 January 2014, including the request for a counter-investigation notably on the grounds of alleged corporate harassment, relate exclusively to the investigation and disciplinary proceedings. As such, they are only to be dealt with in the framework of any ensuing litigation i.e. when challenging the decision taken at the outcome of the

request for review against the disciplinary measure imposed on the requester. Indeed, the requester cannot artificially provoke a separate and parallel procedure by requesting a counter-investigation." Under the heading "Means of redress" he wrote: "[t]his decision may be contested when challenging the decision taken at the outcome of the request for review 2014-0042 by way of a complaint filed with the Administrative Tribunal". Instead, the complainant filed a separate complaint (her twenty-first) directly with the Tribunal.

15. The grounds for her twenty-first complaint are as follows:

(a) the President waived the requirement of an internal appeal in his decision dated 13 June 2014;

(b) she is challenging the decision to reject her request for an Ombudsman to investigate her allegation of institutional harassment, which must be raised separately from her challenge to the outcome of the disciplinary procedure (raised in her twentieth complaint);

(c) the EPO abused applicable procedures by re-opening a closed case;

(d) her allegations of institutional harassment were not examined thoroughly, which breached her right to due process;

(e) she became aware of the irregularities in the investigation process and of the biased and malicious statements made by senior officials only upon receiving the IU report;

(f) the IU committed many errors which amount to institutional harassment;

(g) the EPO continues to subject her to hostile acts such as reassignment; and

(h) the freedom of expression and freedom of association of staff is in jeopardy.

16. The EPO objects to the receivability of the complainant's twenty-first complaint, submitting that under the heading of institutional harassment she is essentially challenging aspects of the investigation and disciplinary proceedings which are already being challenged in her

twentieth complaint; thus her complaint is irreceivable on the grounds that it is based on the same facts and challenges the same decision as in her twentieth complaint. Subsidiarily, the EPO notes that if the Tribunal were to consider the twenty-first complaint as impugning a separate, challengeable decision (of institutional harassment), then it is irreceivable for failure to exhaust all internal means of redress as the decision dated 13 June 2014 cannot be construed as having waived the requirement for an internal appeal. It specifically stated that the decision was linked to the disciplinary procedure and "may be contested **when challenging the decision taken at the outcome of the request for review 2014-0042** by way of a complaint filed with the Administrative Tribunal" (emphasis added). If the complainant wished to continue challenging it as a separate harassment complaint then she had to file an internal appeal after receiving the rejection of her request for review, in accordance with the provisions of Article 109 of the Service Regulations.

17. As the two complaints stem from the same facts, the Tribunal finds it convenient to join them and to rule on them in the same judgment.

18. The complainant's twenty-first complaint is irreceivable in its entirety and will therefore be dismissed. The complainant challenges the President's decisions not to carry out an investigation into her allegations of institutional harassment and to reopen the closed case relating to her email of 12 June 2012. The first claim is irreceivable for failure to exhaust the internal means of redress, as the implied denial of her request is not a final decision in accordance with Article 109(5) of the Service Regulations. The claims against the investigation and disciplinary procedure are irreceivable as the impugned acts are not final decisions, but mere steps in the proceedings that led to the disciplinary sanction which she impugns in her twentieth complaint.

19. The complainant's twentieth complaint is unfounded. Consistent case law holds that "[t]he executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a

body must state the reasons for disregarding it and must motivate the decision actually reached" (see Judgment 3862, under 20) (see also Judgments 3208, under 10 and 11, 3727, under 9, and the case law cited therein). In the present case, the President justified his deviation from the recommendations of the Disciplinary Committee.

20. The President rightly modified the qualification of the complainant's behaviour by stating that "[i]t is in any case undisputable that the facts in question fall within Article 93(1) [of the Service Regulations] according to which '[a]ny failure by a permanent employee or former permanent employee to comply with his obligations under the Service Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action'. Indeed, sending in full knowledge to a large group of persons an email containing accusations likely to highly damage the name and reputation of a staff member does constitute such a failure." Moreover, in the conclusion of the 25 February 2014 decision, the President did not refer to "harassment" at all by deciding that the complainant's "failure to comply with [her] obligations under the Service Regulations ha[d] been proven beyond any doubt and qualifie[d] as serious misconduct under the applicable provisions as well as under the general principles recognised by the International Labour Organization Administrative Tribunal. It also qualifie[d] as breach of the respective rules for electronic communications (Communiqué 10)."

21. Regarding the issue of the 22 June 2012 meeting with VP4 and VP4's follow-up letter, the President assessed correctly that no formal investigation or disciplinary proceeding had been initiated by VP4. That meeting and the follow-up letter from VP4 were merely attempts to de-escalate a difficult situation which had upset the workplace atmosphere following the distribution of the 12 June email. VP4 did not take any of the formal steps required by the processes related to investigations and disciplinary proceedings.

22. Article 93 of the Service Regulations on "Disciplinary measures" provides:

> "(1) Any failure by a permanent employee or former permanent employee to comply with his obligations under these Service Regulations, whether intentionally or through negligence on his part, shall make him liable to disciplinary action.
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> (2) Disciplinary measures shall take one of the following forms:
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> (a) written warning;
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> (b) reprimand;
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> (c) deferment of advancement to a higher step;
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> (d) relegation in step;
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> (e) downgrading;
>
> (f) [...] dismissal and, where appropriate, reduction in the amount of the severance grant under Article 11 of the Pension Scheme Regulations or of the retirement pension and, where applicable, of the portion of remuneration owed as a result of participation in the salary savings plan. Any such reduction shall not be more than one third of the sum in question and, as applied to the pension, shall not make its amount less than the minimum laid down in Article 10, paragraph 3, of the Pension Scheme Regulations.
>
> (3) A single offense shall not give rise to more than one disciplinary measure.
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> (4) Disciplinary proceedings shall be initiated by the appointing authority where necessary on a report made by the immediate superior of the employee concerned.
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> (5) The proceedings in disciplinary matters shall be recorded in writing. No disciplinary measure may be decided unless the employee concerned has been informed of the charges made against him and has had the opportunity to state his case. The employee shall be entitled to be assisted by a person of his choice in his defence."

Article 94 of the Service Regulations on "Consultation of the Disciplinary Committee" provides:

> "(1) The appointing authority shall have the right to issue, on a proposal from the employee's immediate superior or on its own initiative, a written warning or a reprimand without consulting the Disciplinary Committee. The permanent employee concerned shall be heard before such action is taken.
>
> (2) Other measures shall be taken by the appointing authority only after the disciplinary procedure laid down has been completed."

23. Considering the wording of Articles 93 and 94 (as quoted above), it is clear that the meeting with VP4 and the latter's follow-up letter cannot be considered to have been a formal disciplinary proceeding because the complainant was not notified at the meeting (or before) that the meeting was disciplinary in nature, or that she could bring anyone to assist her (Article 93(5)). It is also useful to note that at the time of the meeting, Mr A. had not yet returned from leave and had not read the 12 June email. The conversation between the complainant and VP4 did not constitute an "opportunity to state [her] case" as she was not given time to prepare in advance based on known accusations. None of the disciplinary measures listed in Article 93(2) of the Service Regulations were imposed. The email was not a warning as there is no explicit (or even implicit) reference of warning in the text and it was not a reprimand for the same reason. Since none of the disciplinary measures under Article 93(2) were imposed, the Disciplinary Committee (and the complainant) cannot reasonably submit that the opening of an investigation of harassment upon receipt of the allegations made by Mr A. was tantamount to applying more than one disciplinary measure for a single offence. According to Article 94(1), only the President would have the right to issue a warning or reprimand without consulting the Disciplinary Committee. No mention is made therein of delegation of authority. In comparison with the above informal administrative actions taken by VP4, the complainant was explicitly informed by the President's letter of 2 August 2013 that, following the advice of the IU, disciplinary proceedings were being initiated against her. In its report dated 23 July 2013, the IU found the harassment allegations to be founded and the complainant's behaviour to be in violation of the Service Regulations; it concluded that her behaviour amounted to misconduct. Furthermore, the Tribunal notes that VP4 did not speak with Mr A. regarding the email and its impact on him. VP4 was not at the time aware of Mr A.'s health situation as that information was sent to him only on 27 July 2012. This belies the claim that VP4 had conducted his own investigation. In conclusion, the President acted properly in forwarding the harassment claim made by Mr A. to the IU for investigation.

24. The complainant contends that the IU made an erroneous assessment of the situation, distorted important facts in its report and failed to consider evidence that she had given. She also contends that it was the circulation of the email outside the privileged recipients by Ms B. and Ms S. that caused harm to Mr A., and that the 12 June email did not contain anything which would offend the dignity or the personal honour of Mr A. The Tribunal has not been presented with any convincing evidence that the IU made an erroneous assessment of the situation, distorted important facts or failed to consider evidence. The IU was tasked with verifying the allegations made by Mr A. against the complainant in relation to her 12 June email. The IU did not investigate in depth the work relationship between Mr A. and the deceased staff member though it did request such information from the witnesses, in the proper exercise of its discretion. The IU acted properly by following the procedural provisions of Circulars Nos. 341 and 342, which were in effect at the relevant time, but erred in applying the substantive provisions retroactively. This error was corrected by the President. The Tribunal notes that the complainant misunderstands the nature of the offence. Even if the email had not gone beyond the original distribution list, it still would have been an offence to Mr A.'s dignity, liable to disciplinary action. The claim that there was nothing offensive in the 12 June email is contradicted by the complainant's admission that she was conscious that Mr A. "would feel highly offended" by her statement. The President considered this, along with her refusal to apologize to Mr A., as aggravating factors which outweighed the mitigating factor of her emotional state.

25. The complainant's claim that it is absurd to link her actions with Mr A.'s illness is unfounded. The link between the complainant's 12 June email and Mr A.'s serious illness is proven by the temporal connection as well as by the assessment by the Occupational Health Physician.

26. The Tribunal concludes the complainant acted carelessly, with regard to a very sensitive subject, conscious of the probability that her statement would highly offend other staff members and would create great unrest among colleagues, damaging the work environment.

The Tribunal observes the complainant's actions were serious and wrong and cannot be justified by an alleged good purpose.

27. Considering the above, taking into account the discretion enjoyed by the disciplinary authority and, in particular, the complainant's refusal to apologize to Mr A. and the serious consequences of that behaviour on Mr A.'s health, the Tribunal finds that the contested disciplinary measure is not disproportionate and that the complainant's twentieth complaint must also be dismissed (see Judgment 3640, under 29).

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 6 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ