

L. (No. 4)

v.

EPO

129th Session

Judgment No. 4264

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms M. L. against the European Patent Organisation (EPO) on 7 May 2013, corrected on 12 June, the EPO's reply of 8 November 2013, the complainant's rejoinder of 13 January 2014 and the EPO's surrejoinder of 2 April 2014;

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 her performance management report for the period 1 January 2010 to 18 July 2010.

The complainant joined the European Patent Office, the EPO's secretariat, in 1988. In July 2010 she was transferred from the position of Principal Director of the Pure and Applied Organic Chemistry cluster (PAOC) in Directorate-General 1 (DG1), which she had held since August 2004, to the position of Principal Director of Quality Management, in Directorate-General 2 (DG2).

On 19 November 2010 the Vice-President of DG1 (VP1), who was the complainant's reporting officer until the time of her transfer, sent her a draft version of her performance management report for the period 1 January to 18 July 2010. He indicated under the heading "comments

by reporting officer” that the ratings she had obtained for the previous reporting period had been carried over because she had been present for only 58 days during the 130-day period covered by the report. VP1 proposed two dates for a meeting with the complainant to discuss the report, but the complainant informed him that neither date was convenient in view of her work commitments.

On 1 December 2010 the complainant wrote to the Vice-President of Directorate-General 4 (VP4) requesting a change of reporting officer for the period 1 January to 18 July 2010 on the grounds that VP1 had shown “persisting prejudice” against her. In the event that this request was denied, she asked VP4 to treat her letter as an internal appeal. By a letter of 27 January 2011 the complainant was informed that, after an initial examination of the case, the President of the Office considered that her request could not be granted and had therefore referred the matter to the Internal Appeals Committee (IAC) for an opinion.

The IAC considered the appeal together with four other appeals lodged by the complainant, one of which concerned allegations of harassment against VP1. It held a hearing on 21 May 2012 and issued a single opinion dealing with all five appeals on 5 December 2012. The IAC found that although the conduct of VP1 might on some occasions have been inappropriate and indicative of poor management decisions, there was insufficient evidence to establish mobbing or harassment on his part. It considered that, although the complainant had previously been reluctant to initiate a procedure before the ombudsman, she ought now to be given an opportunity to have her allegations of harassment properly investigated. Regarding the 2010 performance management report, the members of the IAC were divided as to whether her request for a change of reporting officer was justified, but they noted that the debate on this issue was now pointless as VP1 had retired in the meantime. The IAC recommended that the complainant be given the right to request an ombudsman procedure to investigate her allegations of harassment, in which case the appeals concerning her performance management reports (including the 2010 report) could be examined in light of the results of that investigation. In the event that she chose not to resort to an ombudsman procedure, it recommended that the Office

offer her a lump sum payment of 15,000 euros in full settlement of her claims relating to her performance management reports for 2008, 2009 and 2010. The IAC also recommended that she be awarded costs.

By a letter of 18 April 2013, VP4 informed the complainant that the President had decided to dismiss her five appeals. The President endorsed the IAC's conclusion that there was insufficient evidence to support her allegations of harassment by VP1, and he considered, with regard to her 2010 performance management report, that VP1 had rightly carried over the ratings contained in her previous report as she had been present for only 58 days during the relevant period. That is the impugned decision.

The complainant asks the Tribunal to order the EPO to change her reporting officer for the period 1 January to 18 July 2010, and to award her a substantial sum in moral damages in view of the fact that she will have retired by the time the judgment is delivered, so that the amendment of her 2010 report would no longer have any practical effect in terms of her career and professional standing. She also claims costs.

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

CONSIDERATIONS

1. The complainant commenced working for the EPO in January 1988. In August 2004 she was appointed Principal Director of the PAOC cluster in DG1 under a five-year fixed-term contract. These proceedings concern the complainant's 2010 performance management report for the period in that year she held the position of Principal Director of PAOC, namely 1 January 2010 to 18 July 2010.

2. This complaint, filed on 7 May 2013, is the fourth of six complaints filed by the complainant that are presently before the Tribunal. Neither the complainant nor the EPO sought the joinder of this complaint with the other five. While each of the six complaints broadly relates to the same continuum of events with one of the central characters being VP1, mainly each concerns discrete events and each raises different legal issues. This complaint will not be joined with any

of the others, consistent with the Tribunal's case law (see, for example, Judgment 4114, consideration 2) with, additionally, the benefit of creating greater focus on the relevant facts and applicable law attending this complaint and each of the other complaints.

3. It is convenient to note at the outset that 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). However, in the present case, the gravamen of the complainant's grievance is that the reporting officer assessing her performance for the first half of 2010 should have been replaced as she requested. The Tribunal notes that the EPO does not challenge the receivability of this complaint and, in particular, does not question whether there was any relevant final administrative decision.

4. The complainant's request for the removal of the reporting officer, VP1, and his replacement was based on a number of matters identified by the complainant in a letter of 1 December 2010. They, in substance, form the basis of this complaint. The first is that there had been considerable delay on the part of the reporting officer in making the assessment. Several of the remaining are described by the complainant in her brief as "serious formal errors in drafting [the report]". The second matter was that the reporting officer drafted the report without input from the complainant. Thirdly and allied to this point, the reporting officer offered interviews on dates he should have known were unsuitable. Fourthly the objectives to be achieved identified in the report were the full year objectives but this should have been adjusted to accommodate the fact that the complainant left the position of Principal Director of PAOC in the latter part of July 2010. Fifthly the reporting officer incorrectly quantified the number of days of absence on sick leave so that "it was not necessary to carry out an evaluation of the objectives". Sixthly and allied to this point, the evaluation for the short period should have been included in the evaluation of the following regular reporting period. Finally and seventhly the reporting officer failed to identify

the real cause of her absence from work and recognise that, during this period, she continued to perform duties. There is an overarching issue raised by the complainant, namely that she was harassed by VP1 and his approach and the report were infected by prejudice.

5. The first argument of the complainant is a contention there had been considerable delay on the part of the reporting officer in making the assessment. The relevant reporting period concluded on 18 July 2010 and it was not until mid-November 2010 that the reporting officer sought to arrange a meeting with the complainant. The Tribunal accepts this is a lengthy time. However, as the EPO points out, Circular No. 306 (which sets out, amongst other things, the process for creating and the general content of performance management reports) does not address, either expressly or by necessary implication, timeframes for reports concerning a partial reporting period, though doubtless the timeframe has to be reasonable. In the unusual circumstances of this case, when the reporting officer was due to retire from a senior position at the end of 2010 and, as it can be inferred, needed to ensure things were in order, the time was not unreasonable.

6. The second matter raised by the complainant was that the reporting officer drafted the report without input from the complainant. A third and allied matter, is that the reporting officer offered interviews on dates he should have known were unsuitable. It is true the complainant and the reporting officer did not meet. However the contention the complainant made at the time and persists with in her brief that the dates for meetings proposed by the reporting officer after he provided her with a draft report were not suitable to her because of work commitments is unsubstantiated by detailed evidence.

7. The next matter raised by the complainant is that the objectives to be achieved identified in the report were the full year objectives but this should have been adjusted to accommodate the fact that the complainant left the position of Principal Director of PAOC in the latter part of July 2010 and had not been at work for that entire period in the first half of 2010. The Tribunal is not satisfied, having regard to what

was said by way of comment in the report prepared by the reporting officer, that these matters were not taken into account. It is unnecessary to detail the comments made.

8. The next matter raised by the complainant is that the reporting officer incorrectly quantified the number of days of absence on sick leave so that “it was not necessary to carry out an evaluation of the objectives” and allied to this point, the evaluation for the short period should have been included in the evaluation of the following regular reporting period. The approach of the complainant and indeed the response of the EPO appear to proceed on a misapprehension of the effect of Circular No. 306. In the Circular a reporting period is identified in section 2.2 as, ordinarily, the calendar year. When the provision speaks of “periods shorter than three months” it is not referring to a period of time in which the person being evaluated was or was not at work but rather a period of months less than three and, necessarily, less than twelve. So the period 1 January 2010 to 18 July 2010 was not a period shorter than three months even if, in that period, there were extended periods of time when the complainant was absent from work on sick leave. Thus, while the approach adopted by the reporting officer was at odds with the Circular, equally the criticisms of the complainant (founding a request that another reporting officer undertake the assessment) do not find support in the Circular.

9. Finally and seventhly the complainant contends the reporting officer failed to identify the real cause of her absence from work and recognise that, during this period, she continued to perform duties. In view of what is said in the preceding consideration, this is irrelevant.

10. There is an overarching issue raised by the complainant, namely that she was harassed by the reporting officer and his approach, and the report, were infected by prejudice. This matter is also raised in her fifth complaint, which is the subject of Judgment 4265, also delivered in public this day. If a complainant alleges that a decision was not taken in good faith or was taken for an improper purpose, she or he bears the burden of establishing the lack of good faith, bias or improper

purpose (see, for example, Judgments 4146, consideration 10, 3743, consideration 12, and 2472, consideration 9). It is a serious allegation that must be clearly substantiated. The Tribunal is not satisfied it is in the present case.

11. The Tribunal has concluded that all of the contentions and arguments of the complainant are unfounded. Accordingly the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 24 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ