

**L.**  
**v.**  
**EPO**

**129th Session**

**Judgment No. 4261**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M. L. against the European Patent Organisation (EPO) on 20 March 2013, the EPO's reply of 30 July, the complainant's rejoinder of 21 October 2013, the EPO's surrejoinder of 27 January 2014, the complainant's additional submissions of 27 February and the EPO's final comments of 18 June 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 the withdrawal of a decision to assign her additional duties on a temporary basis.

At the material time the complainant was serving as Principal Director of the Pure and Applied Organic Chemistry cluster (PAOC) in Directorate-General 1 (DG1). At the beginning of 2008, the Vice-President of DG1 (VP1) asked her to take on, in addition to her own functions, the duties of the Principal Director of the Biotechnology cluster, who was due to retire. This was to be a temporary arrangement pending the appointment of the latter's replacement. The complainant sought clarification from VP1 concerning, amongst other things, the additional resources that would be available to her in performing this dual role.

In March 2008, having been informed by VP1 that the requested additional resources would be provided, the complainant agreed to take on the temporary assignment as from 1 June 2008. This arrangement was then announced to all the staff of DG1.

However, before the temporary assignment began, the complainant learned that the additional resources might not be provided after all. When she confronted VP1 and the Principal Director of Means (who was responsible for the allocation of resources) on this issue in April 2008, the latter confirmed that the resources would not be provided. Following a heated discussion, the complainant expressed the view that she could not properly manage the Biotechnology cluster in addition to her own cluster unless the requested support was provided. The following day, VP1 informed her that he had decided to cancel his earlier decision and to give temporary responsibility for the Biotechnology cluster to the Principal Director of Means instead. He also sent an email to all Principal Directors in DG1, amongst others, informing them of this change.

In a letter dated 22 July 2008, the complainant protested to the President of the European Patent Office, the EPO's secretariat, against the withdrawal of the temporary assignment, which she regarded as an affront to her personal and professional dignity, but the President rejected her claims and the matter was referred to the Internal Appeals Committee (IAC). The IAC joined the appeal with several other appeals filed by her and, after hearing the parties, issued a single opinion on 5 December 2012. With respect to this matter, it unanimously found that VP1 had reneged on a written promise and had failed to discharge his managerial obligations towards the complainant, whose reputation in the eyes of her colleagues had been harmed. A majority of the IAC also considered that VP1 had abused his authority in reacting harshly. The IAC recommended an award of 10,000 euros in moral damages for injury to the complainant's dignity.

The complainant filed this complaint on 20 March 2013, before having received a final decision on her appeal, impugning the implied rejection of the claims set out in her letter of 22 July 2008. The final decision was taken on 18 April 2013. The President rejected the

complainant's claims, considering that the withdrawal of the decision to assign her additional duties was a managerial decision taken in the interest of the service.

The complainant asks the Tribunal to set aside the decision to withdraw the temporary assignment of the functions of Principal Director of the Biotechnology cluster and to award her 10,000 euros in moral damages, an additional sum as punitive damages for delay in the internal appeal proceedings, and 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. In early 2008 the complainant was asked by VP1 whether she was willing to manage the Biotechnology cluster as well given the impending retirement of the Principal Director of that cluster. This did not eventuate as a result of a decision of VP1. That decision is the focus of these proceedings.

2. The complainant pursued five appeals against various decisions, including a decision about the subject matter of these proceedings, which were dealt with by the IAC in a single opinion dated 5 December 2012 and which were the subject of one decision by the President communicated to the complainant by letter dated 18 April 2013. Her appeal, insofar as it related to VP1's decision not to give effect to the arrangement whereby she would manage the Biotechnology cluster and associated matters, was successful before the IAC. The IAC concluded VP1 had not conducted himself appropriately and the complainant had suffered injury to her dignity. The IAC recommended the complainant be paid 10,000 euros in moral damages. This is the amount of moral damages sought by the complainant in these proceedings. By the time the complainant filed this complaint, there had been no decision made within the EPO on the recommendations of the IAC.

3. In its reply the EPO accepts that this complaint is receivable “[t]o the extent that the complainant challenges the implied decision by the President rejecting her requests for relief relating to the withdrawal of the decision to give her temporary responsibility of the Biotechnology cluster” and refers to Article VII, paragraph 3, of the Tribunal’s Statute. In fact and as noted earlier, an express decision of the President in relation to this grievance and the four other appeals considered by the IAC was communicated to the complainant on 18 April 2013. Consistent with the Tribunal’s case law, the express decision in relation to this particular grievance can be treated as the impugned decision (see, for example, Judgment 3356, considerations 15 and 16).

4. This complaint, filed on 20 March 2013, is the first 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. An exception to this general comment applies to the second and sixth complaints. This first 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.

5. In the express impugned decision in the letter of 18 April 2013, it is said that “the President endorses the [IAC’s] unanimous finding that the withdrawal [of a temporary assignment of further duties in the Biotechnology cluster] was a managerial decision taken in the interest of the service, and that it needed to be taken under time pressure (point 41(c), of the opinion). Therefore the President rejects as unfounded the majority’s supplementary finding that the withdrawal was ‘an act of retaliation’.”

6. It should be noted immediately that the use of the word “therefore” might be a manifestation of error. It is often used to identify the logical consequence of events, circumstances or conclusions.

The fact that a managerial decision was taken in the interests of the service and under time pressure is not inherently incompatible with it also being an act of retaliation. Very often a managerial decision involves choices between courses of action. The adoption of a course of action because it is in the interests of the service, may also be intended, at least in part, as an act of retaliation.

7. When the complainant was asked whether she would be prepared to take on the role of managing the Biotechnology cluster as well as her own cluster, she agreed subject to her being provided with a single 100 per cent cluster business assistant for each of the two clusters, a secretary for the additional cluster and the assistance of additional examiners. She also sought clarification about her status, the duration of the arrangement and compensation. She raised these matters in an email of 2 March 2008 and also in a letter. VP1 responded in an email of 14 March 2008. He said the additional support “will be provided to you” and he addressed the matters about which the complainant sought clarification. The complainant received a letter dated 18 March 2008 from the Principal Director of Human Resources, informing her “[...] that it has now been decided to nominate you to provisionally take over the responsibilities of Principal Director Biotechnology in DG 1 with effect from 1st June 2008”. The DG1 staff was told of this arrangement in a communiqué from VP1 dated 20 March 2008.

8. As events unfolded, the arrangement did not proceed. The circumstances from the perspective of the complainant were set out in a memorandum to the President of the Office dated 15 May 2008. At a meeting on 23 April 2008, held for other purposes, the complainant had a discussion with VP1 and also a Mr F., Principal Director of Means. Mr F. was resisting the provision of the additional support the complainant had sought and VP1 had agreed to provide. In her memorandum of 15 May 2008, the complainant said: “The tone of the discussion regrettably reached unpleasant levels and at the end I told them that under these circumstances I felt that I could not properly manage an additional cluster.” The following day, VP1 met with the complainant (at his request) and told her, as she describes it, “in view

of [her] behaviour the day before, he had decided to give responsibility to manage the [Biotechnology cluster] to Mr [F.]”. Shortly thereafter a note was sent to the Principal Directors in DG1, the Principal Director Personnel and the President. The complainant said of this note in her memorandum of 15 May 2008: “I was dismayed by this intimidating attitude and, as many colleagues, I perceived the said note, which did not explain the reasons beyond it, as a form of public humiliation and punishment for insisting in my request for support.”

9. In the IAC’s opinion an account is given of the majority (three members of the Committee) view of those events. The majority agreed that the end-result, namely the revocation of the assignment, may not have been illogical but went on to say: “However, in [our] view the harsh reaction of VP1 and the speed with which [he] acted indicate that this was not a dispassionate, properly thought-out and rational decision, but rather an act of retaliation and as such an indication of improper motives.”

10. 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. Even if VP1 was influenced by the complainant’s behaviour at the meeting of 23 April 2008, his decision to abandon the arrangement was taken in circumstances where, by her own admission, the complainant had indicated she did not wish to take on the additional duties and responsibility. The above events do evidence poor decision-making on the part of VP1 and, in particular, him agreeing to provide support to the complainant and announcing the arrangement widely within the Organisation in circumstances where the support agreed to could not be guaranteed. However they do not establish that the decision to abandon the arrangement was taken in bad faith, was taken for an improper purpose or was an act of retaliation. Nor, as mentioned by the majority of the IAC, does the arguably high-handed approach VP1 later took to the mechanics of the complainant meeting with the President, namely that this had to be arranged through him.

11. In her pleas, the complainant raises a number of subsidiary issues. One is that no reasons were given for the decision to withdraw the temporary assignment or the reasons given were inconsistent. Another is, in substance, that the EPO failed to protect the complainant's dignity. As to the first mentioned point, reasons were given and while the reasons given were not entirely coherent, it cannot be said that this has, in the circumstances of this case, legal consequences. The second point is of greater substance.

12. It is a well-established principle in the Tribunal's case law, as was recently stated in Judgment 4178, consideration 14, citing Judgment 3353, consideration 26, that "[a]n organisation must care for the dignity of its staff members and not cause them unnecessary personal distress and disappointment where this could be avoided". In the present case the complainant, who held a senior position within the EPO, agreed to take on additional duties subject to certain conditions a significant number of which were directed towards relieving her of some of the burdens of doing so. The complainant received unqualified assurances that her conditions concerning support would be met. The fact that she would take on those additional duties was made known widely within the Organisation. It cannot be doubted, in the Tribunal's opinion, that the abandoning of this arrangement because the unqualified assurances could, in fact, not be met would have caused the complainant considerable distress and disappointment, particularly having regard to the fact that the arrangement had been widely publicised within the Organisation. The complainant is entitled to moral damages which the Tribunal assesses in the sum of 10,000 euros. She is also entitled to her legal costs, which the Tribunal assesses in the sum of 6,000 euros.

13. The complainant also sought punitive damages for the delay in the internal appeal process. On no basis would punitive damages be awarded. If the complainant intended to seek moral damages, the delay, in all the circumstances, was not excessive.

DECISION

For the above reasons,

1. The EPO shall pay the complainant moral damages in the sum of 10,000 euros.
2. The EPO shall pay the complainant costs in the sum of 6,000 euros.
3. All other claims are 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