

L. (Nos. 2 and 6)

v.

EPO

129th Session

Judgment No. 4262

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms M. L. against the European Patent Organisation (EPO) on 19 April 2013, corrected on 1 July, the EPO's reply of 8 November 2013, the complainant's rejoinder of 6 February 2014 and the EPO's surrejoinder of 20 May 2014;

Considering the sixth complaint filed by Ms M. L. against the EPO on 15 July 2013, the EPO's reply of 8 November 2013, the complainant's rejoinder of 11 February 2014 and the EPO's surrejoinder of 23 May 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 2008.

At the material time, the complainant was serving as a principal director in the European Patent Office, the EPO's secretariat. On 6 July 2009 the complainant's performance management report for 2008 was sent to her for comment. For principal directors, the performance management process is governed by Circular No. 306. A five-point rating scale is used, the five possible ratings being "outstanding", "very

good”, “good”, “satisfactory”, and “unsatisfactory”. The complainant’s performance was rated as follows: “good” for management results, “very good” for quality, “good” for productivity, “good” for aptitude, and “satisfactory” for attitude. Her overall rating was “good”. The complainant signed the report on 29 July 2009 having added her comments. She considered that the ratings for management results, productivity and aptitude ought to be “very good”. With regard to the “satisfactory” rating of her attitude, she pointed out that, contrary to the requirements of Circular No. 306, she had not been warned during the performance review meetings she had attended prior to the drawing up of the report that she ran the risk of obtaining a rating less than “good”. Moreover, she considered that the “satisfactory” rating was not consistent with the fact that all her objectives had been achieved. She also objected to one of the reporting officer’s comments concerning her attitude, and she requested that it be deleted. However, the reporting officer, who was the Vice-President of Directorate-General 1 (VP1), saw no reason to modify the report, which was subsequently submitted to the President of the Office as countersigning officer. The President added her comments on 30 September 2009, approving the ratings and comments of the reporting officer.

On 15 December 2009 the complainant initiated an internal appeal against the President’s decision not to modify her 2008 performance management report as requested. On 8 March 2010 the President informed the complainant that she had decided to amend the report by raising the “satisfactory” rating for attitude to “good”, as there was no evidence that a prior warning had been given in this respect, but she rejected the complainant’s other requests. VP1 amended the report accordingly, and he also removed the comment to which the complainant had objected. He sent the amended report to the complainant on 19 May 2010, inviting her to sign it, but the complainant was not satisfied with these changes and pursued her appeal before the Internal Appeals Committee (IAC).

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 2008 performance management report, it found that “there possibly was an incorrect exercise of discretion” on the part of VP1 in rating some aspects of her performance “good” rather than “very good”, but that further investigation, possibly by an ombudsman, would be required in order to determine whether VP1 was in fact biased. 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 2008 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.

On 19 April 2013 the complainant filed her second complaint, relying on Article VII, paragraph 3, of the Statute of the Tribunal. She indicated on the complaint form that the Office had failed to take a decision, within the 60-day period mentioned in that provision, on her internal appeal lodged on 15 December 2009. However, although she was not yet aware of it, the new President had in fact taken a decision on her five appeals on 18 April 2013, rejecting all her claims. With respect to her appeal against the 2008 performance management report, the President considered that, in the absence of any evidence of improper use of discretionary power by either the reporting officer or the former President, the report had to be considered as final. The complainant impugns the decision of 18 April 2013 in her sixth complaint.

The complainant asks the Tribunal to join her second and sixth complaints. In both complaints, she requests that her 2008 performance management report be amended to show the rating “very good” for all aspects of her performance. In view of the fact that she will have retired by the time the judgment is delivered, so that the amendment of her 2008 report would no longer have any practical effect in terms of her career and professional standing, she seeks a substantial award of moral damages for the harm suffered. She also claims costs.

The EPO asks the Tribunal to dismiss both complaints as unfounded.

CONSIDERATIONS

1. The complainant commenced working for the EPO in January 1988. In August 2004 she was appointed Principal Director of the Pure and Applied Organic Chemistry cluster in Directorate-General 1 (DG1) under a five-year fixed-term contract. These proceedings concern the complainant’s 2008 performance management report.

2. These complaints, filed on 19 April 2013 and 15 July 2015, are the second and sixth of six complaints filed by the complainant that are presently before the Tribunal. In her rejoinder to the second complaint and in her brief in her sixth complaint, the complainant seeks the joinder of these two complaints because the former relates to an implied decision concerning the same subject matter as the latter, which relates to the express decision. This was not opposed by the EPO in its pleadings. Given that they raise the same issues of fact and law and seek the same relief, these two complaints will be joined to form the subject of a single judgment, consistent with the Tribunal’s case law (see, for example, Judgment 4114, consideration 2).

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). Yet, as

discussed shortly, the thrust of much of the complainant's pleadings is that in relation to a range of matters assessed, the assessment was wrong and the ratings too low.

4. The complainant's brief in her second complaint to which she refers in her sixth complaint, commences a discussion of the "merits" with the introductory remark that the 2008 performance management report of June 2009 and the revised version of February 2010 "[...] are based on various infringements of law and a misappraisal of factual circumstances [...]". To the extent the complainant invites the Tribunal to address whether there had been a misappraisal and to reappraise factual circumstances, it is an invitation the Tribunal, consistent with the case law, will not take up. The arguments of the complainant on the merits are advanced under seven headings. The first is that there had been an infringement of the principle of good administration. The second is that there had been an infringement of section 4.4(4) of Circular No. 306. That Circular sets out the purpose and role of performance management of Principal Directors and the methodology for creating and completing performance management reports. The third argument is that there had been an incorrect assessment of the performance aspect "Attitude". The fourth argument is that there had been a wrong assessment of the performance level relating to "Management results". The fifth argument is that there had been a wrong assessment of the complainant's productivity. The sixth argument is that there had been a wrong assessment of her "Aptitude". The seventh and final argument is that there had been a wrong assessment of the overall performance level. There is an overarching argument that the reporting officer, VP1, was biased.

5. The substance of the third to seventh arguments is mainly a critique of the assessment made together with a contention that a more favourable assessment should have been made. It is unnecessary for the Tribunal to analyse these arguments for reasons already discussed. The first argument is based on the fact that the complainant, upon returning from holidays, was confronted with a request to sign and return the 2008 performance management report seven days after her return though this was extended by a further three days in response to a request by the

complainant for the period to be extended. The complainant argues that this was “in conflict with the principle of good administration” and a manifestation of the bias of VP1. However, as the EPO points out in its reply, Circular No. 306 does not specify a period for the affected staff member to respond but doubtless, as the EPO appears to accept, the period must be reasonable. The EPO also points out that the complainant did, in fact, respond within the set period. Neither in the complaint brief nor in the rejoinder, does the complainant say she was unable to respond in the time required. The first argument should be rejected though the question of bias will be addressed shortly.

6. The second argument arises because in the original performance management report of June 2009, the complainant’s “Attitude” was rated “satisfactory”. Circular No. 306 provides in section 4.4(4) that if at the time of either of the two review meetings held during the reporting period (one held in May-June and the other in November-December), any of the performance aspects risks being assessed as “satisfactory” (or “unsatisfactory”), the reporting officer will mention this and indicate it in the record of the review meeting. There were several meetings between the complainant and VP1 about her performance. One was held on 29 May 2008 and another on 21 November 2008. There were two meetings in 2009, one on 15 January and the other on 20 March. At none of the meetings was the complainant alerted to the possibility that her “Attitude” might be assessed as “satisfactory”. An inference can clearly be drawn that at least by November 2008, VP1 would have known that there was a risk that the complainant’s “Attitude” might be assessed as “satisfactory”, which engaged the provisions of section 4.4(5). Those provisions expressly state the purpose of informing the staff member of a risk of an “unsatisfactory” assessment, namely to give the staff member a chance to improve before the end of the reporting period. While no such purpose is identified expressly in relation to disclosure of a possible assessment of “satisfactory”, it is tolerably clear it serves entirely the same purpose. It is an important safeguard intended to protect staff being assessed. It is true that, in due course, the President directed that the assessment of “good” in relation to “Attitude” be substituted for the assessment of “satisfactory”. However the failure

of VP1 to follow the entirely sensible course mapped out by Circular No. 306 would have caused the complainant unnecessary distress for which she is entitled to moral damages, which the Tribunal assesses in the sum of 10,000 euros.

7. This leads to a consideration of whether the complainant has demonstrated that VP1 was biased. There were three indicia of bias relied on by the complainant in her brief. One was that VP1 gave the complainant only three extra days to respond to the 2008 performance management report as discussed earlier. Another was the comments of VP1 in the overall performance assessment in the original 2008 performance management report that the complainant showed less understanding for those colleagues who did not meet her own high demands (a reference to the complainant working at a high level of engagement) and, as mentioned in the rejoinder, the failure of VP1 to raise this with the complainant at any performance review meeting. The third was an observation made by VP1 in a note to the President dated 18 September 2009 about the complainant's appraisal, that she had lodged an internal appeal against him in mid-2008.

8. 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. At least the second and third matters referred to in the preceding consideration certainly illustrate inappropriate conduct on the part of VP1. But an allegation of bias ordinarily involves the notion that the decision maker is sufficiently antipathetic towards another for that antipathy to colour and influence the decision. In the present case, this is not established even inferentially.

9. While the complainant has not succeeded in all her arguments, she has demonstrated she is entitled to moral damages for the reasons discussed in consideration 6 above. She is also entitled to costs, which the Tribunal assesses in the sum of 6,000 euros.

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