

E. (No. 10)

v.

EPO

131st Session

Judgment No. 4392

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mrs M. E. against the European Patent Organisation (EPO) on 27 April 2018, the EPO's reply of 24 August, corrected on 10 September 2018, the complainant's rejoinder of 18 January 2019, corrected on 4 February, and the EPO's surrejoinder of 15 May 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to withdraw the disciplinary sanction of reprimand and remove it from her personal file.

In 2003 the complainant joined the European Patent Office, the EPO's secretariat, as a patent examiner. The matter that led to the present complaint arises from a patent application file in respect of which the complainant, as a member of the Examining Division, acted as first examiner. On 1 April 2014 the members of the Examining Division decided to refuse that application. That decision was signed but not notified to the applicant. Instead, the complainant's line manager decided to ask Directorate 115, Patent Procedure Management, for its opinion.

By email of 30 May 2014, the complainant's line manager asked her to inform the patent applicant that a response could be expected in about four or five months. The complainant refused to do so on the basis that she was bound by the final decision already taken by the Examining

Division and that the EPO was required by the rules to notify the decision with immediate effect. During a meeting held on 4 September 2014, the complainant was asked again to send the communication. By email of 8 September 2014, the line manager instructed her, in accordance with Article 10 of the European Patent Convention, to issue the previously requested communication by 12 September 2014. On 10 September 2014 the complainant replied that she considered the order to be unlawful, but the line manager further confirmed the validity of the order. On 12 September the complainant sent the requested communication to the applicant and attached “extensive internal notes” including the exchange of emails she had had with her line manager concerning the order to issue the communication in question. On that same day, the complainant contacted the President of the Office to complain about interference with the work of the Examining Division.

By letter of 10 November 2014, the Vice-President, Directorate-General 4 (DG4) reminded her that the Examining Division is bound by procedural instructions issued by the respective line managers and that not carrying out these instructions or displaying clear obstructive behaviour in carrying them out could compromise the operational efficiency of the Office and the necessary trust between the Office and its employees.

On 2 March 2015 the Principal Director Human Resources informed the complainant that the Office was considering imposing on her a disciplinary measure and asked for her written defence before issuing a decision. By a letter of 27 March 2015, the Office decided to impose on the complainant the disciplinary measure of reprimand for failure to comply with repeated oral and written requests from her line manager and for putting the Office’s image at risk when sharing internal notes with a patent applicant.

On 26 June 2015 the complainant submitted a request for review, which was rejected on 10 August 2015. On 10 November 2015 she filed an internal appeal. After a hearing that took place in June 2017, the Appeals Committee rendered its opinion on 28 November 2017. The majority of its members concluded that all the grounds of appeal were unsubstantiated but recommended that the contested decision be set aside on the grounds that the disciplinary measure imposed was disproportionate. They considered that an award of damages was not necessary.

By letter of 29 January 2018, the Vice-President DG4 decided, by delegation of power, to endorse the majority opinion of the Appeals Committee and to withdraw the reprimand from the complainant's personal file. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision in its entirety and to declare null and void the opinion of the Appeals Committee. She requests that the decision of 27 March 2015 to issue a reprimand be set aside by adding to her personal file her written defence as well as an annex to the reprimand stating that it is quashed and that the decision was based on abuse of power. The complainant seeks compensation in the amount of 1,000 euros per month from the date of insertion of the reprimand in her personal file until the requested documents are added to her personal file. She also seeks 60,000 euros for moral and financial damages and for the loss of career prospects produced by the unjustified reprimand. She further claims costs for the internal appeal proceedings as well as for the proceedings before the Tribunal. The complainant requests 8 per cent interest on all amounts due. Alternatively, she asks the Tribunal to set aside the impugned decision and to declare null and void the Appeals Committee's opinion as well as the whole internal appeal procedure. She requests that the Tribunal refer the case back to the Appeals Committee with the order to treat it in substance with a correctly composed Committee. She seeks compensation of 2,000 euros for the procedural delay and procedural violations. She further claims 5,000 euros in costs for the internal appeal proceedings and the present proceedings. She requests 8 per cent interest on all amounts due.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part and unfounded on the merits.

CONSIDERATIONS

1. The complainant requests the joinder of this complaint with other complaints which she has filed in the Tribunal, namely her second, third, fourth, fifth, seventh and eighth complaints. She states that this complaint is but one of a series of interrelated complaints which she filed in the Tribunal because at least since 2012 she has suffered from recurring attacks on her professional status and her personal dignity. The request is rejected as, in the first place, her second, third, fourth and

seventh complaints were considered in Judgment 4256, delivered in public on 10 February 2020. In the second place, this complaint, which is essentially concerned with a reprimand which was imposed upon the complainant, will not be joined with her fifth and eighth complaints, which challenge her staff reports, because they raise different issues.

2. The complainant's request for oral proceedings will also be rejected as the Tribunal is sufficiently informed of all aspects of the case to consider it fully on the material which the parties have provided.

3. The decision, dated 29 January 2018, which the complainant impugns, accepted the recommendation of the majority of the Appeals Committee to set aside the decision to impose the disciplinary sanction of reprimand upon her for ignoring her line manager's instruction concerning a patent application. The majority of the Appeals Committee members concluded that the sanction was disproportionate and accordingly recommended its withdrawal. They also recommended the rejection of the complainant's internal appeal for the remainder. The impugned decision accordingly rejected the other requests that the complainant had made in her internal appeal, which included a request to add two documents to her personal file: a written defence, as well as an annex to the reprimand stating that it was quashed and that the decision was based on misuse of power.

4. The complainant contends that the decision to impose the reprimand was tainted with substantive flaws because it (as well as the Appeals Committee's opinion and the reprimand) was based on the unsubstantiated assertion that her line manager was empowered to interfere with the responsibilities of the responsible Examining Division. The complainant further contends that the Appeals Committee did not treat the real subject matter of the internal appeal being whether or not the line manager was empowered to interfere with the patent examination procedure and erred in not finding that the order was *ultra vires*.

5. In effect, the complainant invites the Tribunal to find that her line manager's instructions to her concerning the subject patent application were unauthorized interferences which rendered them and any related order *ultra vires*. This, she states, gave her the right to resist his instructions rendering the reprimand for doing so unlawful.

Inasmuch, however, as the impugned decision withdrew the reprimand which was the ultimate result of her line manager's actions, this claim is without object. For the same reason, the complainant's alternative request to refer the internal appeal back to a correctly composed Appeals Committee with an order to treat the case in substance will be rejected. Moreover, the complainant's request to declare the opinion of the Appeals Committee null and void is irreceivable as the Appeals Committee has authority to make only recommendations, not decisions (see, for a similar case, Judgment 2113, consideration 6).

6. In recommending the rejection of the request to add the two documents (mentioned in consideration 3 of this judgment) to her personal file, the majority of the Appeals Committee had concluded, in effect, that the request to add the written defence could only be understood as a subsidiary request if they considered that the reprimand was lawful. The majority however stated that the finding that it was unlawful meant that the reprimand had to be removed from the complainant's personal file in which event the request to add the defence to that file would have become moot. The majority of the Appeals Committee however noted that under paragraph 1.8 of Circular No. 262 on Guidelines on personal files for EPO employees, an employee may request that documents be added to her or his personal file. They in effect suggested that although there was no specific provision that permitted a staff member's comments on a disciplinary measure to be included in her or his personal file, they may be included under Article 32(1)(b) of the Service Regulations for permanent employees of the EPO. The majority of the Appeals Committee concluded that the complainant's request to add the annex to her personal file "would [...] be without subject if the reprimand would be taken out of the personal file as [the majority] recommended".

7. Article 32(1) of the Service Regulations states as follows:

"(1) The personal file of a permanent employee shall contain:

- (a) all documents relating to his administrative position and all reports relating to his ability, efficiency and conduct;
- (b) any comments by him on such documents and reports."

8. In challenging the decision not to include the two subject documents in her personal file, the complainant, in effect, argues as follows: she never requested that the reprimand be removed from her

personal file. She requested that the two documents be added to it. There are documents in that file which relate to interferences with the Examining Division, including her reports from 2012 onwards, as well as the decision to transfer her to a new technical field or an “implied decision to relieve her of some of her functions”, which adversely affected her career. Her personal file is only comprehensible if the defence and the annex are added to it. The reprimand would anyway have been deleted from her file at her request pursuant to Article 96(1) of the Service Regulations. The statement by the majority of the Appeals Committee that her request to add a defence to her personal file could only be understood as a subsidiary request in the event that the reprimand was considered to be lawful meant that they had doubts about how her requests to add the defence and the annex to her personal file were to be understood. The Appeals Committee’s failure to ask her to clarify this during its hearing amounted to a procedural violation and a violation of her right to be heard. The withdrawal of the reprimand disregarded the principle of prohibition of *reformatio in peius* according to which a person cannot be put in a worse position as a result of an appeal, for example.

9. The foregoing submissions are untenable. The complainant’s statement, in her complaint brief, that “[t]he reprimand would have meanwhile been anyway deleted from [her] personal file on her request in accordance with Article 96(1) [of the Service Regulations]” signifies that the reprimand which she intended to counter by the addition of the defence and the annex to her personal file no longer exists. In any event the contested reprimand had been withdrawn. Accordingly, the issue whether the defence and the annex should still be added to the complainant’s personal file is without object. Furthermore, any document that a permanent employee wishes to add to the personal file must be, in accordance with Article 32(1)(b), related to documents contained in the personal file. As the reprimand was withdrawn, no documents commenting on it can be added to the personal file by the complainant.

10. In her internal appeal and before the Tribunal, the complainant also questioned the independence and impartiality of the Appeals Committee. In the impugned decision, the Vice-President DG4 accepted the majority Appeals Committee’s opinion that the Committee was constituted in accordance with the rules that were applicable at the material time, which sufficiently guaranteed its independence and

impartiality. The complainant expresses doubt about this finding, but expressly “refrains at this stage from any further arguments” concerning the matter and asks the Tribunal to decide the substance of the case as she considers that its remittal to the Appeals Committee is not expedient.

11. In the impugned decision, the Vice-President DG4 accepted the recommendation of the majority of the Appeals Committee to reject the complainant’s claim for moral damages. She had claimed moral damages in the amount of 1,000 euros per month from the time that the reprimand was first put into her personal file until the date on which the defence and the annex were added to her personal file, as she requested. The Appeals Committee had concluded that having set aside the decision to impose the reprimand, there was no further moral damage to be compensated. The complainant however argues that she should have been awarded the moral damages which she sought under this head since the reprimand remained in her personal file for approximately the three-year period after which it could have been expunged at her request pursuant to Article 96(1) of the Service Regulations. She submits that it could thereby have impacted her adversely. Her request for moral damages on this basis will be rejected as she has failed to articulate by evidence, rather than by conjecture, the impact which the insertion of the reprimand into her personal file had upon her. For the same reason, her request for “compensation for moral and financial damages as well as lost career perspectives produced by the unjustified reprimand” will also be rejected (see, for example, Judgment 3778, consideration 4).

12. In her internal appeal, the complainant requested compensation for procedural delays “in view of long lasting attacks on [her] dignity”. The Tribunal finds that the recommendation of the majority of the Appeals Committee, accepted in the impugned decision, correctly rejected that request as being beyond the scope of the appeal. In her submissions before the Tribunal, the complainant also seeks compensation for procedural delay. However, the two-year period within which the Appeals Committee provided its opinion after the complainant lodged her internal appeal was not unreasonable in the circumstances of this case. Moreover, she has not articulated the adverse impact which the alleged delay had on her (see, for example, Judgments 4231, consideration 15, and 4147, consideration 13). The Tribunal accordingly rejects the request for compensation for procedural delay.

13. The impugned decision did not grant the complainant's request for the costs which she incurred in the internal appeal proceedings. She repeats that request in these proceedings.

The Tribunal determined that such costs may only be awarded under exceptional circumstances (see, for example, Judgments 4157, consideration 14, and 4217, consideration 12), which do not exist in the present case. Additionally, the complainant's request to declare the whole internal appeal procedure null and void *ab initio* is rejected as she provides no basis for doing so.

14. In the foregoing premises, the complaint should be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 24 March 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 14 April 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ