Registry's translation, the French text alone being authoritative.

101st Session **Judgment No. 2558**

The Administrative Tribunal,

Considering the complaint filed by Ms H.R.-M. against the European Patent Organisation (EPO) on 8 July 2005, the Organisation's reply of 25 October, the complainant's rejoinder of 23 November 2005 and the EPO's surrejoinder of 9 March 2006;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, who has dual German and French nationality, was born in 1956. With effect from 1 January 2002 she was given a probationary appointment as Director of Personnel Management, at grade A5, in the European Patent Office – the secretariat of the EPO. She was employed in Munich.

On 20 June 2002 the complainant's supervisor, Mr L., signed the complainant's interim probation report; he noted in the report that the complainant was progressing satisfactorily but he hoped that she would be able to become more familiar with internal administrative rules and procedures during the second part of her probationary period. Mr L. took early retirement on 1 September 2002 and was replaced on an interim basis by Mr G. On 28 November the latter signed another report in which he expressed appreciation for the complainant's theoretical knowledge but regretted her lack of practical experience in managing the personnel department of a large international organisation. Under general remarks, he added that the particularly difficult conditions in which the probation had taken place, which had resulted in a lack of supervision in particular, might explain why the complainant had been unable to make the necessary improvements. Mr G. recommended a six-month extension of the probationary period. This report was countersigned by the Vice-President in charge of Directorate-General 4 (DG4). The complainant handed in her comments on 5 December 2002. In a letter of 13 February 2003 Mr G. notified the complainant that following her discussions with himself and the Vice-President he was confirming the six-month extension of her probationary period. On 6 May the complainant filed an internal appeal challenging that decision.

On 19 May 2003 Mr G. signed the final probation report, in which he stated that, despite the many occasions on which he had explained the complainant's shortcomings to her, she had not taken advantage of the opportunity given to her to improve her performance; he recommended that her appointment should not be confirmed. As Mr G. had been replaced with effect from 1 April 2003, his successor confirmed the assessment and also signed the report. The complainant submitted her comments on 2 June. By letter of 18 June the Principal Director of Personnel notified her that the President of the Office had decided to dismiss her with effect from 30 June 2003.

On 23 July 2003 the complainant filed an internal appeal against the implicit rejection of her appeal of 6 May 2003 and against the decision to dismiss her. For her main claim she sought confirmation of her appointment with retroactive effect. The Appeals Committee, to which the case was referred, issued its opinion on 18 March 2005. In its view, the decision to dismiss the complainant was lawful "in both form and substance". On the other hand it considered that the decision to extend the complainant's probationary period, though well founded, was tainted with two procedural flaws: a breach of the complainant's right to be heard, insofar as she had not been given a chance to submit her comments before the extension decision was taken, and the fact that the said decision had not been notified in writing to the complainant in good time. The Committee recommended that the Office grant her six months' net salary in compensation for moral injury, bear her legal costs and reject all other claims. By a letter dated 20 May 2005, which constitutes the impugned decision, the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to follow the Committee's recommendation and grant her six months' net salary, as well as the reimbursement of her legal costs.

B. The complainant begins by stating that while she does not dispute the fact that the President of the Office

holds discretionary authority to dismiss a probationer at the end of a probationary period, she considers that in her case he exercised that authority arbitrarily. She also maintains that she was the victim of prejudice insofar as her last two probation reports were drawn up by an official, Mr G., who was not in a position to assess the progress of her probation objectively; she points out that Mr G. was only rarely present in Munich and that the periods during which he could have assessed her performance were very short. According to her, the report of 28 November 2002 related to a period of just over two months, during which Mr G. had moreover substantially altered her duties. As for the report of 19 May 2003, that covered only a period of three months. Noting that in the field of personnel management she had had to work with a succession of supervisors, the complainant accuses Mr G. of blaming her for the consequences of this mismanagement. She asserts that Mr G. proved "incapable" of providing the assistance he was meant to give her and preferred instead to "write her off". In her opinion, her case shows similarities with that ruled on in Judgment 2172.

The complainant contends that the letter of 13 February 2003 did not show that the decision had been taken by the President of the Office; this constituted a breach of Article 13(2) of the EPO Service Regulations. It follows, according to her, that Mr G.'s decision to extend her probationary period was in fact taken *ultra vires*. In this respect she recalls that in Judgment 2028 the Tribunal held that proof of a delegation of authority had to be provided. The complainant considers further that she was not properly notified of the said decision, that is, before it took effect on 31 December 2002. She was thus led to believe that her appointment was implicitly confirmed with effect from 1 January 2003.

The complainant also maintains that the decision to dismiss her is flawed because essential facts were overlooked. She points out that although Mr G. acknowledged that her probationary period had taken place under difficult conditions, he failed to draw the logical conclusion from that fact. The EPO, she alleges, thus drew an obviously wrong inference from the facts when it decided that her performance was inadequate. Referring to the Tribunal's case law, the complainant denounces the fact that she received no job description, nor was she given any warnings from her supervisors.

She argues lastly that her rights of defence were breached, both in the course of her probationary period and before the Appeals Committee. She points out that the decision to extend her probationary period was taken before she had a chance to submit her comments, and she adds that it was only in the course of proceedings before the Appeals Committee that she learnt of Mr G.'s note dated 18 May 2003, where he wrongly alleged that she had expressed doubts regarding her own ability to perform her duties. The complainant also accuses the Committee of having refused to ask the EPO to produce certain documents and of restricting its choice of witnesses to those called by the Organisation.

The complainant asks the Tribunal to set aside the decision of 20 May 2005, insofar as it did not entirely meet her claims, as well as her last two probation reports and the dismissal decision of 18 June 2003. She also seeks reinstatement with all legal effects, additional compensation for moral injury, on the grounds that the President had granted her only the minimum amount that she had claimed, and an award of costs.

C. In its reply the EPO contends that the complaint is partially irreceivable insofar as the complainant has not exhausted internal remedies with respect to her claim for additional compensation.

On the merits, the Organisation considers that the decision to extend the complainant's probationary period was not unlawful since it has not been shown that the decision was taken *ultra vires*. It argues that in taking that decision the Vice-President in charge of DG4 necessarily acted by delegation from the President of the Office. It adds that the letter of 13 February 2003 showed clearly that the complainant had been informed in the course of meetings that her probationary period would be extended, and it recalls that Mr G. stated that he had kept the President informed of the matter. It acknowledges that the letter in question reached the complainant with some delay, but points out that that is why she was paid six months' salary in compensation.

The defendant further contends that the dismissal decision rested on "substantiated professional considerations". It denies that the period covered by the probation report of 28 November 2002 was too short. The complainant was supervised by Mr L. from 1 January to 30 August 2002, and then by Mr G. from 1 September 2002 to 31 March 2003, and the probationary period was long enough to give rise to serious doubts in the minds of her supervisors regarding her ability to perform her duties. According to the Organisation, there is no evidence in the file to support the allegation of prejudice on Mr G.'s part, since the latter explicitly took account of the difficult conditions in which the probation had taken place. The EPO also denies that the lack of a job description could constitute a flaw

in the conducting of the complainant's probation, and it deduces from Mr G.'s testimony that she received all necessary assistance. Regarding the alleged lack of warning, the defendant adds that the complainant should have been fully aware from the content of her probation reports that her performance was lacking.

The EPO lastly contends that the argument that her rights of defence were breached during the proceedings before the Appeals Committee is unfounded, given that the complainant had the opportunity to submit a brief in reply and was heard in the course of the two hearings which were held.

D. In her rejoinder the complainant submits that since the issue of compensation for moral injury was raised before the Appeals Committee she is entitled to dispute before the Tribunal the amount of compensation paid to her under that head.

On the merits she reiterates her arguments. She points out that any decision to extend a probationary period, if not issued directly by the President or by direct delegation of his authority, is unlawful. She specifies that she is claiming 7,500 euros in costs.

E. In its surrejoinder the Organisation maintains its position.

CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 January 2002. She was appointed as Director of Personnel Management, at grade A5, in Munich, with a probationary period of one year.

In the interim report on the probationary period which the complainant's supervisor drew up on 20 June 2002, he noted the complainant's excellent work and satisfactory progress but mentioned that she was not familiar enough with the Office's operating procedures and rules. A second report, written on 28 November 2002, concluded that the probationary period should be extended by six months in order to enable the complainant to gain a better grasp of "how to apply her theoretical knowledge and experience in practice". In her final probation report, drawn up on 19 May 2003, the reporting officer recommended that the complainant's appointment should not be confirmed.

On 18 June 2003 the complainant was informed that the President of the Office had decided to dismiss her with effect from 30 June 2003.

2. Meanwhile, on 6 May 2003, the complainant had filed an internal appeal against the decision to extend her probationary period, of which she had been notified in writing on 13 February. On 23 July 2003 she filed a second internal appeal, challenging both the implicit rejection of her first appeal and the decision of 18 June 2003.

After joining those appeals, the Appeals Committee recommended granting the complainant damages for moral injury, on the grounds that the Office had breached her right to be heard and that, by not giving her timely notice of the decision to extend her probationary period, it had led her to entertain a reasonable expectation which had been disappointed. The Committee further recommended that the Office reimburse her in respect of the legal costs she had incurred. As an attempt to reach a settlement on the basis of these recommendations was unsuccessful, the President of the Office decided to pay the complainant six months' net salary in compensation and to refund her legal costs insofar as they had been reasonably incurred. The complainant was notified of this by a letter of 20 May 2005, which constitutes the impugned decision.

She asks the Tribunal to set aside that decision and, inter alia, her last two probation reports.

3. The complainant admits that the interim probation report of 20 June 2002, which was quite favourable, was drawn up by a supervisor who was able to assess her work objectively. On the other hand, according to her, the same does not apply to the two subsequent reports, which in her view reflect prejudice on the part of the official responsible for assessing her performance. She submits that the person who drew up the report of 28 November 2002, who did not always work in Munich, supervised her only for some two months, during which time her duties changed substantially. The same official drew up the report at the end of the extended probation period on 19 May 2003, but he had left the job more than six weeks previously. She suggests therefore that neither he nor his successor, who also signed the report, would have been in a position to assess her performance.

(a) It should be noted in the first place that the complainant's situation is in no way similar to that leading to

Judgment 2172, in which the Tribunal concluded that a personality clash between the person undergoing probation and her immediate supervisor might have led to a misappraisal of the probationer. The complainant has not shown that her supervisors attempted to blame her for the consequences of internal mismanagement.

(b) The complainant's criticism of the way her probation was conducted, on the other hand, is not entirely unfounded. At the time she took up her duties, her predecessor had been retired for five months and staff changes continued among officials who should have been involved in training and supervising her and who were hence responsible for assessing her performance. It is clear, therefore, that during her probationary period the complainant did not enjoy the best assistance and supervision.

(*i*) However regrettable these circumstances may be, they are not such as to invalidate either the decision to extend the complainant's probationary period beyond the end of 2002 or the decision to dismiss her at the end of the extension.

(*ii*) The two probation reports preceding those two decisions complied with the formal requirements of the first paragraph of Article 13(2) of the Service Regulations. They were drawn up respectively a little earlier than one month before the expiry of the second six months of probation and approximately six weeks before the expiry of the extension period. The complainant had the opportunity to comment, and did so extensively.

(*iii*) Both those reports mention the difficult conditions in which the probation took place and the supervisor's wish to take due account of that fact in their appraisal. It was partly owing to those circumstances that the complainant was granted a further opportunity to demonstrate her ability during an extended probationary period.

Those reports also mention the complainant's personal qualities, her professional skills and her considerable theoretical experience in managing the human resources of private companies. However, they drew attention to shortcomings arising from insufficient experience acquired within an international organisation, as a result of which some of the measures she took allegedly did not always correspond to the Office's practical requirements.

Those appraisals and conclusions were approved without reservations by the official responsible for countersigning the reports. The complainant's two supervisors, who in turn supervised her work during the first 15 months of her probation, gave considered, plausible appraisals of her strengths and weaknesses when they were heard by the Appeals Committee.

(*iv*) The Tribunal therefore does not agree with the complainant's view that the last two probation reports reflect prejudice on the part of the official responsible for assessing her performance. It notes on the contrary that her performance was assessed objectively and consistently in the light of the whole period covered by each of the two reports.

The complaint's first plea therefore fails.

4. The complainant then contends that the decision to extend her probationary period was unlawful, on the grounds that it was taken *ultra vires* and that the decision was wrongly given retroactive effect.

(a) The decision to extend the complainant's probationary period was notified to her in a letter of 13 February 2003 from the Principal Director of Personnel – her supervisor – who drew up the last two probation reports. This letter refers to the report of 28 November 2002 and to discussions that the complainant had had about her appraisal with both her supervisor and the Vice-President of DG4, who had countersigned the report.

According to the complainant, the decision to extend her probationary period is unlawful because it was not taken by the President of the Office. According to the second paragraph of Article 13(2) of the Service Regulations, the President may decide, in exceptional cases, to extend a probationary period. The complainant does not deny that the President can delegate this power, but she maintains that in her case there is no proof that he did so.

It is for the Organisation to prove that whoever decides to extend an official's probationary period, or to dismiss the official, is authorised to take that decision, either by virtue of a statutory provision, or by virtue of a lawful delegation by the person in whom such authority is vested under that provision (see Judgment 2028, under 8, third paragraph, and 11).

The defendant has not shown that the Principal Director of Personnel was competent or held a delegation of

authority; it merely acknowledges in its reply “that there is no decision signed by the President extending the complainant’s probationary period”. It argues that this does not invalidate the decision to extend the probationary period in view of the absence of any obvious error in the assessment of the complainant’s performance. This argument is surprising insofar as it clearly arises from a confusion between the formal requirements and the substantive requirements of an administrative decision. Whether a decision is justified or not in substance, whoever takes the decision must in all cases make sure beforehand that he has the power to do so and, if not, refer the matter to the competent authority for a decision. The fact that this requirement was not complied with in the present case is all the more incomprehensible since the decision to be taken concerned the appointment of an official to a managerial post and such a decision was likely to affect the running of a whole division of the Administration.

In the absence of any formal delegation by the President, the Tribunal concludes that the complainant’s plea that the decision to extend her probationary period was taken *ultra vires* is well founded. This flaw will not lead it to set aside the decision in question, but it does justify compensating the complainant for any moral injury the flaw may have caused her.

(b) The decision to extend the probationary period was not notified to the complainant in writing until 13 February 2003. The Appeals Committee therefore noted that by the end of the normal probationary period, i.e. by 31 December 2002, the complainant had not been notified of the formal decision of extension which she should have received by that date. The Committee recognised that this violated the principle whereby individual decisions adversely affecting an official must be notified to the latter in writing and in good time. The Committee treated this violation, however, as a flaw which did not affect the validity of the decision and considered that it could be made good satisfactorily by the payment of compensation for any resulting injury suffered by the complainant.

The complainant was notified in good time of the conclusions of the report of 28 November 2002. She does not deny that she discussed the matter with her supervisors, as mentioned in the letter of 13 February 2003. On 12 December 2002 she certified that she had read the report, adding her comments dated 5 December 2002. The Appeals Committee was justified in considering in the circumstances that, although the complainant had been deprived of her right to obtain written confirmation of the decision to extend her probationary period before it expired, this procedural flaw did not invalidate the decision. It was therefore correct in surmising that financial compensation would be sufficient to redress the damage the complainant had suffered owing to the fact that, being still employed on 1 January 2003 without having received any official notification regarding her future status, she could have entertained a reasonable doubt regarding that status until she received the communication of 13 February 2003.

(c) The complainant, however, objects to the fact that the Appeals Committee recommended paying her only the minimum compensation that she was claiming. But she offers no solid argument to convince the Tribunal that the sum she was granted was not sufficient to compensate for her injury. This plea therefore does not succeed and there is no point in examining the issue of whether the claim for payment of additional compensation for moral injury is irreceivable, as maintained by the defendant.

5. The complainant contends that her defence rights were breached, first during her probationary period and then during the internal appeals procedure.

(a) The Appeals Committee found that the decision to extend the probationary period was taken before the complainant’s comments had been obtained. The compensation paid to her was partly intended to redress that flaw; for the reasons given above there is no need to give this matter any further consideration.

According to the complainant, her rights of defence were also breached in this case because the President referred to an internal note that mentioned doubts that she had herself allegedly expressed regarding her ability to cope with her duties. She maintains that this note did not appear in her personal file and that she was not aware of it until it was produced by the Office in the course of the internal appeals procedure. This also constitutes a flaw which is open to criticism. It does not, however, result in the impugned decision being set aside since the complainant had the opportunity in the course of the internal procedure to comment extensively on the subject and content of the note, which in any case was not decisive, and thus the Tribunal concludes that this procedural flaw has been made good.

(b) The complainant accuses the Appeals Committee of having itself breached her defence rights by hearing only witnesses called by the Office and excluding those whom she had presented, and also by refusing to call on the

Office to produce the documents she requested.

The witnesses heard by the Committee were the complainant's first two immediate supervisors who supervised her work during her probation. According to the minutes of the hearing, they were invited to comment in detail on the conducting of the probation, and the complainant and her counsel had every opportunity to raise any questions they wished. The complainant offers no evidence to suggest that these witnesses were called at the defendant's behest or that they were heard without her knowledge when evidence was being collected by the appeals body, which would have been in breach of the principle that the parties must be treated equally (see Judgment 999, under 4). The Organisation in fact strongly denies such a suggestion in its surrejoinder, stressing the complete independence that it grants the Appeals Committee. There is nothing in the submissions which might lead the Tribunal to doubt this denial.

Ideally, the Appeals Committee would have given reasons for rejecting the complainant's offer of additional evidence in the form of the testimonies of seven witnesses and 15 documents that the Office was being asked to produce, or would at least have made it clear in its opinion that the evidence already produced was sufficient to lead it to an objective assessment of the relevant facts. The complainant, however, offers no convincing explanation that all these items of evidence are really relevant. The Tribunal cannot therefore consider the rejection of the proffered evidence as constituting abuse of the broad discretion that internal appeals bodies must enjoy in this area.

6. On the merits the complainant contends that an obviously wrong inference was drawn from the evidence. According to her, the Administration failed to take account of essential facts relating to her probation. She maintains that she never received any job description and was adversely affected by unexpected changes in her duties. She also asserts that she received no warnings regarding her alleged shortcomings. Moreover, the assessment of her performance in her final probation report was made by a supervisor who had no longer been responsible for supervising her work for the six preceding weeks.

(a) The purpose of a probationary period is to inform the Administration regarding the ability of the probationer to perform his duties and regarding his efficiency and conduct in the service; a probationer whose work has not proved adequate will be dismissed at the end of the probationary period (Article 13(2), paragraph 1, of the Service Regulations). The decision not to confirm an official's appointment at the end of his probationary period lies at the discretion of the competent authority. If a complaint is filed against such a decision, the Tribunal will set it aside only if it rests on a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority (see Judgments 1444, under 8, 1418, under 6, and 1352, under 12).

(b) In the present case, the final probation report was signed by the two persons who successively supervised the complainant's work during the extended probationary period. The conditions in which the probationary period was conducted were undoubtedly unsatisfactory for the reasons mentioned above (under 3(b)). In particular, it was hardly appropriate that the first of those officials was not assigned permanently to Munich, where the complainant was working, and that his successor supervised her work for the space of only a few weeks.

(c) But in the circumstances of this case, those facts do not detract from the relevance of the comments contained in the final probation report. The two reporting officers supervised the complainant's work one after the other from 1 September 2002 until the end of the probationary period. The first was heard on 8 December 2004 by the Appeals Committee and the explanations he gave reflect not a deliberate intention to remove the complainant from her post but rather a constant concern that she should complete her probationary period successfully in the interest of the Organisation. The second signed the report without reservations, emphasising that he maintained very close contacts with the complainant professionally. This unreserved endorsement is not as insignificant as the complainant suggests, since it was given at the end of the extended probationary period and since the complainant and this supervisor had already maintained working contacts for over a month and a half at the time he added this note to the report drafted by his predecessor, who had supervised the complainant's work for six months.

(d) There is no evidence in the file that the complainant objected to the absence of a job description when she joined the Office or that she expressed serious reservations regarding the subsequent changes in her official duties. Similarly, the fact that the complainant did not receive any formal warning regarding her alleged shortcomings is not decisive, since she had regularly discussed her performance with her supervisors in order to find ways of making a significant improvement.

The Tribunal finds that the parties made a combined effort to achieve that result but without success, because the complainant had not received the specific training she would have needed, regardless of whether or not there was any mismanagement. In any case, the Tribunal cannot view the impugned decision as resulting from an obviously wrong inference drawn from the evidence.

7. The complainant's only plea that succeeds is the one mentioned under 4(a) above and which relates to the absence of any proof that the President of the Office formally delegated his power to extend the probationary period. This flaw entitles the complainant to compensation for moral injury, which the Tribunal sets equitably at 1,000 euros.

8. Since she partially succeeds, the complainant is entitled to 2,000 euros in costs.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 1,000 euros in moral damages.

2. It shall also pay her 2,000 euros in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 17 May 2006, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2006.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 21 July 2006.