

L. (No. 8)

v.

EPO

133rd Session

Judgment No. 4489

THE ADMINISTRATIVE TRIBUNAL,

Considering the eighth complaint filed by Ms M. L. against the European Patent Organisation (EPO) on 6 December 2019, the EPO's reply of 2 April 2020, the complainant's rejoinder of 22 June and the EPO's surrejoinder of 8 September 2020;

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 amount of moral damages paid to her by the EPO for the decision not to finalise her two performance management reports for 2011 and part of 2012.

The complainant is a former employee of the European Patent Office, the EPO's secretariat. She was Principal Director of Principal Directorate Quality Management from 19 July 2010 to 12 November 2012.

On 29 June 2012 the complainant attended a review meeting with her reporting officer, the then Vice-President of Directorate-General 2 (DG2), in relation to her performance for 2011 and the first and second quarters of 2012. This was the last working day of the Vice-President of DG2, who retired on 1 July 2012. Both reports assessed the complainant's overall performance to be "Very good". The complainant signed the report for 2011 after the meeting of 29 June 2012. She signed the report

for 2012 on 12 July 2012, at the same time submitting an annex to the report in which she made two comments on the report.

As from September 2012 the complainant was on sick leave.

The reports were sent to the President of the Office as the complainant's countersigning officer. As the complainant did not receive the finalised reports, she sent several reminders to the Administration between October 2012 and February 2013.

By a letter of 28 January 2014 the President informed the complainant that her Principal Director contract, which was due to expire on 31 July 2014, would not be renewed. That decision is the subject of her ninth complaint.

On 11 March 2014 the President informed the complainant of his decision to refrain from endorsing the 2011 and 2012 (first and second quarters) reports, considering that they could no longer be finalised. He noted that both reports had reached him after the reporting officer had separated from service and that the complainant had attached comments to the 2012 report, making it doubtful that an agreement on the report had been reached. He also added that the performance management for Principal Directors took into account their limited-term employment and was focused on future performance and, since the complainant had recently been informed of the non-renewal of her contract, he had decided in view of these exceptional circumstances to refrain from endorsing the reports. The complainant filed an appeal against that decision on 14 April 2014.

In October and November 2014 the complainant requested, unsuccessfully, the urgent treatment of three pending appeals including her appeal in the present case.

The complainant informed the Secretariat of the Appeals Committee in August 2017 that she did not wish to make use of the right to be heard in oral proceedings.

In its opinion of 17 October 2018 the Appeals Committee found that the failure to complete the two reports could only be attributed to the EPO and that the fact that the countersigning officer did not consider himself in a position to finalise the reports in view of the reporting officer's departure should not be to the detriment of the complainant. It unanimously recommended to refer the matter back to the EPO to assess whether or not it would be possible to complete the complainant's two

reports and, if the reports were to be completed, to pay her 2,000 euros in moral damages for the delay in finalising them or, if the EPO considered it impossible to complete the reports, to pay her 5,000 euros for the breach of its statutory obligation. It further recommended to award the complainant 300 euros in moral damages for the undue length of the procedure.

The complainant was informed on 10 September 2019 that the EPO had decided to follow the unanimous recommendations of the Appeals Committee. Regarding the two reports, in view of the time that had elapsed and the retirement of all the parties involved, it had become manifestly impossible to finalise the reports. Consequently, she was awarded 5,000 euros in moral damages, as well as 300 euros for the length of the procedure. That is the impugned decision.

The complainant asks the Tribunal to join the present complaint with her seventh and ninth complaints currently pending before the Tribunal or, subsidiarily, to treat the three complaints in sequence. In the event that the Tribunal accedes to her request for joinder, she claims material damages to be calculated in the framework of the overall conclusion of the Tribunal, 10,000 euros in moral damages for the attack on her professional dignity, 3,000 euros for the undue delay in the procedure, as well as costs. In the event that the Tribunal decides to treat this complaint independently from the others, the complainant claims 30,000 euros in material damages for the far-reaching consequences on the non-renewal of her contract, 10,000 euros in moral damages for the attack on her professional dignity, 3,000 euros for the undue delay in the procedure, as well as costs.

The EPO objects to the joinder on the ground that the three complaints do not raise the same issues of fact and law. It requests the Tribunal to dismiss the complaint as irreceivable in part with respect to her claims for relief which arise from or relate to the decisions to transfer her to the post of Senior Advisor and the decision not to renew her Principal Director contract, or to her alleged involuntary resignation, as these issues are not before the Tribunal and are the subject of other proceedings. It also requests that the complainant's claim for material damages be dismissed as irreceivable for non-exhaustion of internal remedies. It submits that the complaint is otherwise unfounded on its merits.

CONSIDERATIONS

1. When the complainant, who has since separated from the EPO, was a member of staff, action was taken by her reporting officer to create two performance management reports for her, one for her performance in 2011 (the 2011 Report) and the other for her performance in the first two quarters of 2012 (the 2012 Report). The reports were never finalised.

2. The failure of the Office to finalise the reports was the subject of a grievance pursued by the complainant internally, culminating in an opinion of the Appeals Committee of 17 October 2018 and a decision of 10 September 2019 of the Principal Director Human Resources, acting on delegation of power from the President of the Office, responding to the Committee's recommendations. This is the decision impugned in these proceedings. The Principal Director said she had decided to follow the unanimous recommendations of the Committee for the reasons stated in its opinion. Accordingly, she allowed the appeal against an earlier decision of the President of 11 March 2014 not to endorse the complainant's two performance management reports. The Principal Director decided to pay the complainant 5,000 euros moral damages as had been recommended by the Committee if the Office thought it was manifestly impossible to complete the reports. It did and this is not contested by the complainant. The Principal Director also decided to pay 300 euros for the length of the procedure, also as recommended by the Committee.

3. Before further considering the issues raised in these proceedings, one procedural issue should be noted. The complainant seeks the joinder of this, her eighth complaint, with an earlier complaint, her seventh, and a later complaint, her ninth. This procedural course is opposed by the EPO. While the facts in each of these complaints are part of the same continuum of events, the legal issues raised are quite discrete. Accordingly, the complaints will not be joined. That is not to say that the Tribunal cannot have recourse to the judgments given in the other complaints.

4. As would be apparent from the foregoing, it is only necessary for the Tribunal to address the question of whether the relief determined in the impugned decision was, in substance, appropriate or, in amount, adequate. In her brief, the complainant seeks, on the assumption this

complaint is not joined with the others, material damages in the amount of 30,000 euros together with 10,000 euros in moral damages and 3,000 euros for the length of the procedure, as well as costs.

5. It is convenient to commence with a consideration of the approach of the Appeals Committee and, necessarily, the approach of the Principal Director who adopted the Committee's reasons. While the complainant does not challenge all the Committee said, aspects of its approach are criticised in her pleas. The Committee in its report segmented, not inappropriately, the case of the complainant into three topics under the general heading of the lawfulness of the decision not to endorse the performance management reports. The first was whether the statutory requirements concerning performance management reports had been met. The Committee concluded they had not been. It is unnecessary to elaborate on why that was so.

6. The next topic concerned the complainant's contention that the decision not to endorse the performance management reports had been arbitrary. There is one significant difficulty with the Appeals Committee's analysis. It was considering the failure of the President to endorse two reports. The Committee said it agreed that the 2011 Report had been finalised between the complainant and the reporting officer. The assessment of the complainant's overall performance in that report had been "Very good" and there had been no comments made in the report by the complainant. The Committee then turned to consider the 2012 Report and, after noting that in this latter report there had been two comments by the complainant, it discussed the role of the countersigning officer, the second-level supervisor. In this case it was the President. It noted the discussion of the Tribunal in Judgment 3692, consideration 14, that the role of the second-level supervisor was of substance and it was to ensure that the staff member was "shielded from a biased assessment by a supervisor". Thus, as the Tribunal observed, the second-level supervisor had to take care to ascertain that the assessment submitted for her or his approval did not require modification.

7. After the foregoing discussion including the reference to Judgment 3692, the Appeals Committee said:

"In view of the above, the Committee cannot accept the [complainant]'s argument that the President could have endorsed the reports without any further discussion with the Reporting Officer, as this was not necessarily the case."

What the Appeals Committee failed to do was differentiate between the two reports. Even if the above comments were true of the 2012 Report viewed in isolation, they were not true of the 2011 Report. That is to say, there was no justification for the President not to sign promptly, without any further action, the 2011 Report as the second-level supervisor. The Committee would have been justified, as argued by the complainant in these proceedings, in concluding that the President's refusal to sign promptly the 2011 Report was indeed arbitrary. Had that conclusion been reached, it would not have been a large step for the Committee to conclude that the refusal to sign promptly the 2012 Report was also arbitrary, particularly as the President could have contacted the reporting officer in the days immediately following the reporting officer's retirement to resolve any queries or addressed the matter with the reporting officer's successor, both being points made by the Committee. The subject matter of the complainant's comments in the 2012 Report was very narrowly focused (the publication of a Handbook) and she plainly did not contest the assessment of her overall performance as "Very good". Had the matter been approached this way, the clear inference would have been available to the Appeals Committee that the President's decision to refuse to sign either report was arbitrary. It is an inference the Tribunal is, itself, able to draw.

8. The third and final topic addressed by the Appeals Committee was the relationship between the performance management reports and the end of the complainant's Principal Director contract. The Committee did not accept that the non-renewal of the complainant's contract was based solely on operational grounds and not on performance. It pointed to the fact that even though the post the complainant then occupied would cease to exist from 1 August 2014:

"[...] that did not necessarily mean that her contract could not be renewed. It is common within the Office for Principal Director vacancies to be filled by way of transfer. [...] The Committee therefore considers that there is *prima facie* merit in the [complainant]'s argument that the reports (assessing her performance as 'Very good') would have been relevant in deciding whether or not to renew her contract."

The Tribunal agrees.

9. It is appropriate to turn now to the question of relief against the background of what was addressed by the Appeals Committee as just discussed and the adoption of its reasons by the Principal Director Human Resources. In the internal appeal, the complainant sought moral damages but did not seek material damages. Accordingly, her claim for material damages in these proceedings in the Tribunal is not receivable (see, for example, Judgment 3967, consideration 5, and also Judgment 4304, consideration 8).

10. The moral damages were quantified by the Appeals Committee in the sum of 2,500 euros for each report “for the breach of [the Office’s] statutory obligation”. This assessment was made after a thoughtful consideration of several judgments of the Tribunal and the amounts awarded in which there had been material procedural breaches in the preparation of staff reports. However, in the present case, the circumstances were atypical. The complainant was a senior member of staff and the President’s refusal to complete the reporting process was arbitrary. That refusal persisted after he transferred the complainant to another position over her opposition and in the period leading up to a decision not to renew her contract. The moral injury caused to the complainant by the President’s arbitrarily refusing to complete the reporting process, is obvious. In these proceedings, she claims moral damages in the sum of 10,000 euros for the failure to complete the reports. This amount is appropriate and it is in addition to any moral damages already paid by the EPO.

11. The complainant also seeks moral damages for the delay in the procedure. The Appeals Committee’s assessment of those damages was 300 euros. In the circumstances, this amount does not fully compensate for the moral injury suffered by the complainant by virtue of the delay. The two reports, signed by the complainant’s reporting officer, were sent to the President in July 2012. It was not until March 2014 that the President informed the complainant that he would not endorse the two reports. Against that background, the complainant filed an internal appeal in April 2014. The complainant resigned, on medical grounds, with effect from 31 July 2014. In October and November 2014, the complainant requested, unsuccessfully, the urgent treatment of three pending appeals including her appeal in the present case. It was not until May 2017 that the EPO filed its position paper. The pleas concluded in September 2017. A little over a year later the Appeals Committee rendered its report, in

October 2018. A little less than a year later the impugned decision was made, in September 2019. This delay of over five years to complete the internal appeal process is, in all the circumstances of this case, egregious. It would plainly have had a deleterious effect on the complainant. The complainant is entitled to the moral damages she claims in these proceedings for the delay, namely 3,000 euros. The complainant is also entitled to costs assessed in the sum of 1,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 13,000 euros, in aggregate, by way of moral damages in addition to any moral damages already paid by the EPO.
2. The EPO shall pay the complainant 1,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 20 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ