

E. (No. 12)

v.

EPO

139th Session

Judgment No. 4978

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Ms M. E. against the European Patent Organisation (EPO) on 12 March 2019 and corrected on 19 April 2019, the EPO's reply of 5 September 2019, the complainant's rejoinder of 6 January 2020 and the EPO's surrejoinder of 15 April 2020;

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 her staff report for 2012.

At material times, the regulatory framework within the EPO for creating and reviewing staff reports was embodied in Circular No. 246, entitled "General Guidelines on Reporting". If a staff member was not in agreement with the content of her or his report, Section D facilitated a conciliation procedure between her or him and her or his reporting and countersigning officers, under the direction of a mediator appointed by the President of the European Patent Office, the EPO's secretariat. If no agreement was reached at the end of the mediation procedure, Section D(7) permitted the staff member to pursue the matter before the Internal Appeals Committee in accordance with Articles 107 and 108 of the Service Regulations for permanent employees of the Office.

The complainant joined the Office in 2003 as an examiner. At material times, she worked in Directorate 1524 under the supervision of Mr L. She was then transferred to Directorate 1504 until the closure of the Area of Competence in Berlin, Germany. As from 1 April 2015, she was transferred to Directorate 1507.

Due to a change of supervision as from 1 September 2012, the complainant requested to have two separate staff reports for the reporting exercise 2012-2013: one for the period from 1 January 2012 to 31 August 2012, during which Mr L. was her director and reporting officer, and another for the period from 1 September 2012 to 31 December 2013. She indicated that she considered Mr L. and her countersigning officer for the first period to be partial and requested their replacement. By an email of 28 November 2012, she reiterated her request and indicated that her email should be regarded as an internal appeal.

On 19 December 2012, the complainant was informed that two staff reports would eventually be drawn up and that her request for the replacement of the reporting and countersigning officers could not be granted on the basis that she had not submitted any convincing evidence that her supervisors had acted with partiality or had shown bad faith. She lodged an appeal with the Appeals Committee. The appeal was examined by the Committee, which issued its opinion on 18 March 2016, and was rejected by a decision of the President of the Office dated 13 May 2016. On 8 August 2016, the complainant filed her second complaint with the Tribunal impugning this decision.

Following the public delivery of Judgments 3694 and 3785 on 6 July and 30 November 2016 respectively, in cases that did not involve the complainant but in which the Tribunal had found the Appeals Committee to be improperly composed at the time of its opinion of 18 March 2016, the President withdrew his decision of 13 May 2016 and referred the complainant's internal appeal back to a newly constituted Committee for a fresh examination.

On 13 March 2018, the complainant was informed that the remitted appeal would be reconsidered by the Appeals Committee based on the file as it then stood and she was given the opportunity to add further

comments, which she did not. On 4 April, she was advised that her appeal could be dealt with in a summary procedure. In its report of 16 October 2018, the Committee unanimously recommended rejecting the appeal as manifestly irreceivable and awarding the complainant 300 euros in compensation for moral damages on account of the length of the procedure. By a letter of 12 December 2018, the President endorsed the Committee's recommendation to reject the appeal. The complainant was invited to reconsider withdrawing her second complaint, which she did not, and the complaint was dismissed as moot in Judgment 4256, delivered in public on 10 February 2020.

With regard to the staff report for the period from 1 January 2012 to 31 August 2012, a prior interview was held between the complainant and Mr L. on 22 January 2013. The report was signed by the reporting and countersigning officers on 5 and 6 March 2013 respectively. Her quality, productivity, aptitude, attitude to work and dealings with others were assessed as "good", and so was her overall performance rating.

On 8 April 2013, the complainant expressed her disagreement with the report and referred to the appeal she had previously lodged (and which was still pending at that time), wherein she had requested the replacement of the reporting and countersigning officers for suspicions of partiality. On 23 April, Mr L. submitted his final comments in which he indicated that the complainant had not provided any substantial argument likely to justify any changes in the report nor had she provided any evidence of bias or lack of neutrality. These comments were endorsed by the countersigning officer on 7 May 2013.

On 7 June 2013, the complainant requested the application of the conciliation procedure set out in Section D of Circular No. 246.

A conciliation meeting took place on 15 November 2013, but no agreement could be reached. The mediator drew up a report on 26 November and sent it to the Vice-President of Directorate-General 1 (DG1) for a decision.

On 16 December 2013, the Vice-President of DG1 decided that the report would remain unchanged. On 14 March 2014, the complainant lodged an internal appeal requesting in the main that the staff report be withdrawn and that a new report be drawn up by impartial officers, and

that she be awarded moral and financial damages, as well as costs. Her appeal was forwarded to the Appeals Committee.

In its opinion of 16 October 2018, the Appeals Committee unanimously recommended remitting the staff report for a new decision and awarding the complainant the payment of 500 euros in moral damages for the length of the procedure. By a letter dated 12 December 2018, the complainant was informed that the President of the Office had decided to follow the Committee's recommendations. She was thus informed that her staff report had been remitted to the reporting and countersigning officers for a new decision. A new staff report for the concerned period was attached to the 12 December decision and she was invited to comment thereon, which she did on 19 December, reiterating her suspicions of partiality against Mr L. and the countersigning officer "for objectively justified reasons". Her comments were added in the final report. The 12 December 2018 decision is the impugned decision in the present complaint.

The complainant asks the Tribunal to decide on the merits of the case, to set aside the impugned decision and the staff report for the period from 1 January 2012 to 31 August 2012, to declare that the Appeals Committee's opinion is null and void and to order that a new staff report be drawn up by impartial and unbiased officers. She also seeks compensation for the injury allegedly suffered, in the amount of 10,000 euros, plus 4,000 euros for the delay in the internal appeal procedure (including the 500 euros already granted), an award of 2,000 euros in costs and interest on all amounts due. In the alternative, she requests that her case be remitted to the EPO for examination by a duly composed Appeals Committee, that she be awarded 4,000 euros in damages "for the procedural delay [and] the involved procedural violations", and that she be paid 3,000 euros in costs and interest on all amounts due.

The EPO notes that the complainant attempts to broaden the scope of the dispute by focusing on the disagreements between her and her line managers since 2012 rather than on the staff report itself which conveys a favourable assessment of her overall performance. It also considers that she makes an attempt to have the Tribunal adjudicate

upon the status of examiners, which is beyond its competence because the European Patent Convention, on which the complainant relies in her complaint, does not form part of her rights and terms of appointment. As to the claim regarding compensation in the amount of 10,000 euros, it notes that the complainant intends to request compensation for loss of career advancement and that she is not allowed to file claims about a separate and distinct decision. It also contends that the claim aimed at declaring that the Appeals Committee's opinion is null and void should be rejected as that opinion is merely a step in the process. The EPO requests the Tribunal to dismiss the complaint as partly irreceivable and unfounded.

CONSIDERATIONS

1. As the complainant challenges the impugned decision on procedural and substantive grounds, the Tribunal refers to its consistent case law which it recalls in consideration 2 of Judgment 4977, also delivered in public this day.

2. In the internal appeal procedure, the Appeals Committee rejected the complainant's objection to the hearing being conducted by videoconference. The complainant contested what she referred to as the "structural independence and impartiality of the Committee" regarding its composition pursuant to Articles 111 and 112 of the Service Regulations for permanent employees of the Office. In her appeal, she further alleged that the contested staff report was unlawful because of bias on the part of her reporting and countersigning officers, who, in her view, should have awarded her the marking of "very good", instead of "good" for each category evaluated, as well as for the overall performance rating. The complainant claimed moral and financial compensation, including moral damages for delay in the internal appeal procedure, as well as the reimbursement of the costs she had incurred in the internal appeal. She requested that the contested staff report be withdrawn and that a new staff report for that period be drawn up by impartial and unbiased reporting and countersigning officers. She also sought protection

against “arbitrary treatment by parts of the [A]dministration”. Alternatively, she requested that some remarks and statements of the staff report be deleted and that the markings she was awarded for quality, productivity, aptitude, attitude to work and dealings with others and for the overall performance be upgraded to “very good”.

3. Having considered the complainant’s pleas, the Appeals Committee rejected her objection to its impartiality as it considered that that plea had not been substantiated. It also concluded that the complainant’s allegations of bias against her reporting and countersigning officers had not been substantiated. The Committee also concluded that the marking of “good” for the assessment of quality for the subject period was consistent with the comments of the reporting officer under that category in the staff report. It also concluded that, inasmuch as the Office had undertaken to amend the reporting officer’s comments under productivity “as being in the lower part of good”, the complainant’s request to amend it had become moot. The Committee further considered that the rating of “good” for the complainant’s aptitude was consistent with the reporting officer’s comments under that category, which the Committee concluded were balanced and fell within the scope of the reporting officer’s discretion. It found that the assessment for that category was flawless. The Committee however concluded that comments made in the category attitude to work and dealings with others were unbalanced and recommended the staff report be set aside in that respect. The Committee also concluded that the comments in the overall performance category were consistent with the comments in the other marking categories, which were also consistent with the overall “good” rating.

4. Regarding the complainant’s request for moral and financial damages, the Committee considered that its recommendation to remit the staff report for a new decision was sufficient to give “full satisfaction” to the complainant at that stage so that additional compensation was not warranted. It however recommended that the complainant be paid 500 euros in moral damages for the delay of over four years in the internal appeal proceedings. The Committee did not

however recommend awarding the complainant the costs she had incurred in the internal appeal procedure. In line with the Committee's recommendations, the President of the Office had indicated, in the impugned decision dated 12 December 2018, that he had earlier accepted the findings of the Committee, and had send the matter back to the reporting and countersigning officers. They had provided a further report which the President provided in the letter of the 12 December 2018 and upon which the complainant commented on 19 December. It was this report that founded the complaint before the Tribunal.

5. The complainant contests the impugned decision in so far as it provided the new staff report, on essentially the same pleas she proffered in her internal appeal. The EPO does not challenge any procedural aspect of the steps taken by the complainant. By way of relief, she requests the Tribunal to:

- (1) decide the case on the merits and not refer it back to the EPO;
- (2) set aside the impugned decision;
- (3) declare the opinion of the Appeals Committee null and void;
- (4) set aside the staff report for the period from 1 January 2012 to 31 August 2012;
- (5) order that a new staff report be drawn up for the same period;
- (6) order that the new staff report be drawn up by impartial and unbiased officers;
- (7) order that she be paid compensation in the amount of 10,000 euros for the injury she has suffered on account of the disputed staff report;
- (8) award her further damages for the excessive delay in the internal appeal procedure in the amount of 4,000 euros, including the 500 euros she was already awarded for this;
- (9) award her costs in the amount of 2,000 euros;
- (10) award her compound interest of 6 per cent per annum on all amounts due;

- (11) grant her oral proceedings pursuant to Article 12, paragraph 1, of the Tribunal's Rules;
- (12) join this complaint with her second complaint.

Alternatively, the complainant requests the Tribunal, in the event that it determines that it would be inexpedient for it to itself decide the matter, to:

- (a) remit the matter to the EPO for examination by a duly composed Appeals Committee;
- (b) award her 4,000 euros in damages "for the procedural delay [and] the involved procedural violations";
- (c) order that she be paid 3,000 euros in costs;
- (d) award her compound interest of 6 per cent per annum on all amounts due.

6. The complainant's requests that the Tribunal decides the case and not refer it back to the EPO invites the Tribunal to determine the markings she should be awarded under each head of evaluation and the overall performance rating. The request is rejected by reference to the general principles recalled in Judgment 4977, consideration 2. The evaluation of a staff member's performance falls within the discretion of the officers charged with conducting it. Since the Tribunal will not substitute its own assessment for that made by the persons or bodies responsible for assessing an employee's merits, the request would involve an impermissible determination by the Tribunal of what the appraisal should be (see, recently, Judgments 4893, consideration 5, and 4786, consideration 1). The Tribunal however observes that it may, if appropriate, set aside the contested staff report at the same time as the impugned decision and remit the matter to the EPO for review.

7. The complainant's request for oral proceedings is rejected as the Tribunal considers that the parties have presented sufficiently extensive and detailed submissions and documents to permit it to make an informed decision on the case.

8. The complainant's request for the joinder of this complaint with her second complaint is moot as her second complaint was the subject of Judgment 4256, delivered in public on 10 February 2020.

9. The complainant's request to declare the Appeals Committee's opinion null and void is irreceivable, as the EPO submits. This is because, in itself, that opinion was merely a preparatory step in the process of reaching the final decision, which the complainant impugns. Established precedent has it that such an advisory opinion does not in itself constitute a decision causing injury which may be impugned before the Tribunal (see, for example, Judgments 4791, consideration 3, 4721, consideration 7, and 4637, consideration 5).

10. Regarding the Appeals Committee's procedure, the complainant repeats the objection she raised in her internal appeal concerning the Committee's conduct of the hearing by videoconference. She argues, in effect, that the Committee was wrong to reject her request to postpone the hearing on that objection. However, the Appeals Committee had correctly pointed out that its use of videoconferences was permitted by Rule 11(3) of its own Rules of Procedure. This Rule relevantly permitted the presiding member of the relevant chamber of the Committee to decide that a hearing could be conducted by that method, to make the necessary arrangements for it and to inform the parties accordingly. Moreover, the Tribunal holds that the Committee had correctly concluded that its conduct of the hearing by use of the videoconference did not prejudice the complainant. The complainant provides no evidence that leads the Tribunal to a contrary conclusion. Her suggestions that the Committee's conduct of the hearing by that method could not guarantee confidentiality and that she had reason to assume that she had already "been a victim of secret recording/transmission in the past" amount to mere conjecture and do not advance her case on this issue any further. Based on the foregoing, the Tribunal determines that the complainant's contention that the Appeals Committee wrongly rejected her objection to its procedure on these bases is unfounded.

The complainant's additional allegation that the Appeals Committee's procedure was flawed because she had not been provided with the entire appeal file is also rejected. It is notable that she has not refuted the EPO's statements, in its reply, which suggest that she had access to all of the relevant documents that were in the appeal file. The complainant's further allegation that the Committee's procedure was flawed because the reporting officer assisted the EPO during the hearing is also rejected. She provides no authority that precluded the reporting officer from doing so.

11. The facts above disclose that, following the public delivery of Judgments 3694 and 3785, the EPO took the necessary steps to properly constitute the Appeals Committee. The complainant's submission according to which the Appeals Committee which heard her underlying internal appeal was "still not composed in a balanced manner and in accordance with general principles of law and [she] thus suspect[ed] [that Committee] to be partial for objectively justified reasons", is unfounded.

12. The complainant challenges the contested staff report primarily by repeating the allegations she made before the Appeals Committee that her reporting and countersigning officers were partial and biased. Notably, however, the complainant's submissions to support these pleas are essentially the same which she proffered in her fifth complaint. The Tribunal determines, as it did in consideration 12 of Judgment 4713 on that complaint (citing Judgments 4543, consideration 8, and 3380, consideration 9) that the complainant, who bears the burden to provide evidence of sufficient quality and weight to persuade the Tribunal that her allegations of bias or partiality are well founded, has not discharged that burden. Her pleas of bias and partiality repeated in this complaint are therefore unfounded.

13. The complainant's challenge to the merits of the contested staff report is also unfounded. The Tribunal is satisfied that the Appeals Committee undertook a detailed, balanced, coherent and persuasive analysis of the evaluation made in the staff report and the methodology

adopted. The Committee addressed in some detail the markings the complainant's reporting and countersigning officers awarded in the contested staff report and reasonably concluded that their evaluation was flawed to the extent that the comments made in the category attitude to work and dealings with others were unbalanced and thereupon recommended the staff report be set aside in that respect. The Tribunal determines that the Committee, which in its opinion noted the discretion which a reporting officer enjoys in conducting an assessment, properly acted within its review powers when it so concluded.

14. Regarding the complainant's claim for damages for the excessive delay in the internal appeal procedure in the amount of 4,000 euros, including the 500 euros she was already awarded under this head, the Tribunal's consistent case law holds that the amount of compensation for unreasonable delay in internal proceedings will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay. These considerations are interrelated as a lengthy delay may have a greater effect. That latter consideration, the effect of the delay, will usually depend on, amongst other things, the subject matter of the appeal (see Judgments 4804, consideration 5, 4563, consideration 14, and 3160, considerations 16 and 17). In the present case, it is not apparent that the delay in the internal appeal procedure had a significant adverse impact on the complainant warranting further compensation. Thus, this claim is rejected.

15. The preceding reasons entail a detailed and comprehensive consideration of all arguments advanced by the complainant. It cannot be assumed that in the future reasons of this character will be given and that the matter will not be dealt with in a much more summary way.

16. In the foregoing premises, the complainant provides no persuasive proof of circumstances falling within the scope of the Tribunal's limited power of review and the Tribunal finds no fault with the contested staff report and the impugned decision. The complaint will therefore be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 6 February 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER