Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

G.

v.

EPO

121st Session **Judgment No. 3617**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms M.-F. G. against the European Patent Organisation (EPO) on 10 March 2013 and corrected on 11 April, the EPO's reply of 5 August, the complainant's rejoinder of 7 October 2013, the EPO's surrejoinder of 9 January 2014, the complainant's further submissions of 6 June and the EPO's final comments thereon of 20 August 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 the decision requiring her to undergo a medical examination during the investigation of her complaint of harassment and the dismissal of that complaint.

The complainant entered the service of the European Patent Office, the EPO's secretariat, in 2006. On 22 July 2009 she submitted a complaint to the President of the Office asking her to initiate an investigation into the "reprehensible conduct" in which her Director and one of her colleagues had been engaging since January 2007. The President agreed to take this action and an ombudsperson was then

appointed. On 31 December 2009, after hearing the parties and several witnesses, the Ombudsperson submitted her report in which she concluded that the complainant had not been harassed.

In the meantime, on 16 December 2009, the Principal Director of Human Resources had informed the complainant that, in accordance with Article 26(2) of the Service Regulations for Permanent Employees of the European Patent Office, he had decided, on the advice of the Ombudsperson and having consulted the EPO's medical adviser, that she was to undergo a medical examination. He explained that the purpose of this decision was to protect her health and her well-being within the Office. On 20 January 2010 the complainant lodged an internal appeal against this decision, asking that it be cancelled on the grounds that it was contrary to the aforementioned Article 26(2) and "to the Universal Declaration of Human Rights". The examination in question took place on 3 February 2010. On 12 March 2010 the complainant was notified that the request which she had made in her appeal had been denied and that the matter had therefore been referred to the Internal Appeals Committee (IAC) for an opinion.

Having been informed by a letter of 4 February 2010 that the President had decided, on the basis of the Ombudsperson's report, to dismiss her complaint of 22 July 2009, the complainant lodged a second appeal on 23 February 2010. On 21 April 2010 she was informed that her claims could not be granted and that the matter had therefore been referred to the IAC for an opinion. The complainant, who opted for the written procedure, contended that her dignity had been undermined because she had been "forced" to undergo a medical examination and that her case had never been "administratively closed". In addition, she submitted that the Ombudsperson's investigation had been flawed in several respects and that, in view of the time which had elapsed since the acts in question, it was now impossible "really to shed light" on this matter. She claimed the payment of "three months' […] salary [in compensation] for the major injury to her dignity" caused by the fact that she had been forced to undergo a "psychiatric type of" medical examination on 3 February 2010, "three months' […] salary […] because the consultation of the medical adviser [had]

never been settled by the Office", "three months' […] salary [in compensation] for the futility and lack of professionalism of [the Ombudsperson's] investigation" and "three months' […] salary because it would be pointless to start another real investigation, since too much time [had] elapsed since the acts in question and no real light could probably be shed after all [those] delays". She also asked to be credited with the one day of annual leave which she had had to take in order to be interviewed by the Ombudsperson and to be reimbursed for the "expenditure incurred at the time of the [medical] examination" on 3 February 2010. Lastly, she requested the removal of the Ombudsperson's report from her medical file. The EPO considered that both the complainant's internal appeals were unfounded.

On 6 December 2012 the IAC issued a single opinion on the two appeals. As far as the first was concerned, it found that the decision of 16 December 2009 had undermined the complainant's dignity, since there had been no evidence that her health was at risk, and it found that there was no record of the examination of 3 February 2010 in the complainant's medical file. As far as the second appeal was concerned, it considered that the investigation had not been conducted in accordance with "best practice". It added that the conclusion that the complainant had not been harassed was based on insufficient evidence and that it was now too late to establish certain facts, which meant that the flaws affecting the investigation could not be remedied. The majority of the IAC members recommended that the complainant should be awarded 20,000 euros in compensation for moral injury and costs. The IAC also unanimously recommended that the day of annual leave which she had had to take in order to meet with the Ombudsperson should be reinstated and that the EPO should ensure that the outcome of any medical examination ordered by the medical adviser was recorded in the employee's medical file.

In her complaint filed on 10 March 2013 the complainant impugns the implied decisions to dismiss her two internal appeals. She presses the claims which she presented to the IAC and also requests "the complete and irreversible destruction of the medical record" of the medical examination of 3 February 2010 and of the "correspondence

between the medical adviser, various members of the staff of [Directorate General] 4 and [herself]", the payment of "three […] months' salary for the President's decision rejecting the unanimous opinion of the Internal Appeals Committee", the payment of "three […] months' salary for the inordinate length of the internal proceedings", compensation of 3,000 euros to "defray the expenditure incurred" and costs.

In its reply the EPO states that the complainant was informed by a letter of 19 June 2013 that both her appeals had been dismissed, since the Vice-President of Directorate General 4 considered, on the one hand, that the decision requiring her to undergo a medical examination, being consistent with the EPO's duty of care, had caused her no injury and, on the other, that the Ombudsperson's report was neither "wrong" nor heavily flawed, as the Committee had found. The EPO had nevertheless decided to grant the complainant one day of annual leave in compensation for the day which she had had to take in order to be interviewed by the Ombudsperson. The EPO apologizes to the complainant for the late notification of this decision. It also submits that the claim for the destruction of the complainant's medical file is irreceivable, because internal remedies have not been exhausted. For the remainder, it submits that the complaint should be dismissed as groundless.

In her rejoinder the complainant presses her claims and draws attention to the fact that she has still not been credited with the additional day of annual leave announced in the decision of 19 June 2013.

In its surrejoinder the EPO informs the Tribunal that the decision to credit the complainant with one day of annual leave was implemented on 24 June 2013.

In her further submissions the complainant points out that the EPO credited her with one day of annual leave on her leave balance that closed on 31 December 2012 and did not carry it over to the balance for 2013. She therefore maintains all her claims.

In its final comments the EPO explains that it has replaced two half-days of annual leave with two "authorised absences", thus providing the complainant with an extra day of annual leave.

CONSIDERATIONS

1. The complaint directed against the implied decisions to dismiss the complainant's internal appeals of 20 January and 23 February 2010 must be regarded as impugning the decision expressly dismissing those appeals, which was taken by the Vice-President of Directorate General 4 in the course of the proceedings on 19 June 2013.

The receivability of the request that the Tribunal order the complete destruction of the medical record established during the medical examination and of various letters

2. Precedent has it that a complainant may enlarge on the arguments presented before internal appeal bodies, but may not submit new claims to the Tribunal (see Judgment 3420, under 10). As this request is presented for the first time to the Tribunal, it must be declared irreceivable.

The claim for reinstatement of one day of leave

3. Since the EPO has produced an excerpt of the printout of leave records showing that the day in question has been given back to the complainant, the Tribunal finds that this claim is moot and that there is therefore no reason to rule on it.

The lawfulness of the decision requiring the complainant to undergo a medical examination

4. The complainant submits that the Principal Director of Human Resources lacked "the authority" to order her to undergo a medical examination.

Under Article 10(i) of the European Patent Convention, the President of the Office "may delegate his functions and powers". Pursuant to this provision the President adopted an act of delegation which entered into force on 1 November 2008. It provided that, with regard to the implementation of Article 26(2) of the Service Regulations,

the power of decision was delegated to the Principal Director of Human Resources.

The Tribunal infers from this that it was by virtue of a lawful delegation that the Principal Director of Human Resources decided on 16 December 2009 to require the complainant to undergo a medical examination in accordance with the aforementioned Article 26(2). The objection that he had no authority to do so must therefore be dismissed.

5. The complainant submits that she has never been able to find out what exact purpose was served by the medical examination ordered by the Principal Director of Human Resources on 16 December 2009 and that the Ombudsperson's e-mail of 3 December 2009, on which he based this decision, "offered no valid reasons".

According to the Tribunal's case law, a staff member needs to know the reasons for a decision so that she or he can act on it. A review body must also know the reasons so as to determine whether it is lawful, as must the Tribunal in order to be able to exercise its power of review. How ample the explanation need be will turn on the circumstances (see Judgments 1355, under 4, and 1817, under 6).

6. The decision of 16 December 2009 was taken by the Principal Director of Human Resources on the basis of Article 26(2) of the Service Regulations, which provided at the material time that "a permanent employee shall submit to any medical examination ordered by the President of the Office in the interests of the staff or of the service". While this paragraph allowed the decision-making authority a margin of discretion when ordering a medical examination the EPO, when stating its reasons for such an examination, cannot simply refer to the interests of the service or of the staff without providing any further details, as it does in its submissions.

In the instant case, the above-mentioned Director informed the complainant that the purpose of the decision in question was to protect her health and her well-being within the Office. He also explained that he had taken this decision after consulting the Medical Adviser and on

the advice of the Ombudsperson, who had based her opinion on "[her] interview and other communications with [the complainant], as well as the notes she had sent [her], and evidence from the respondents and witnesses in the case".

7. The Tribunal notes that the reasons given to the complainant to justify the decision requiring her to undergo a medical examination are confined to a general reference to the protection of her health and well-being and to the EPO's duty of care towards her. Such terms are meaningless unless they are accompanied by more precise information enabling the employee and, as the case may be, the Tribunal to ascertain the real reasons underpinning the decision taken, especially when it involves a measure, such as requiring an employee to undergo a medical examination, which should be hedged with safeguards.

8. The Tribunal therefore considers that the complainant was insufficiently informed of the reasons why she had to undergo a medical examination and that she was thus prevented from challenging the grounds for this decision in full knowledge of the facts.

9. It follows from the foregoing that the decision of 16 December 2009 did not comply with the duty to state grounds set forth in Article 106 of the Service Regulations and embodied in the Tribunal's case law. Moreover, the paucity of the reasons given for the decision ordering this medical examination was likely to cause the complainant to question its purpose to the extent of causing her unease.

The lawfulness of the decision to dismiss the complaint of harassment

10. The complainant challenges the validity of the Ombudsperson's report mainly on the grounds that the latter based her findings on some "counteraccusations" of the complainant's former Director and a former colleague without her being able to refute them.

In its reply and surrejoinder the EPO asserts that the report had been drawn up "with care" and that the Ombudsperson – whose "rigour

and professionalism have never been called into question" – had conducted a "careful, thorough and exhaustive" investigation. It considers that the complainant has not proved that the way in which the investigation was carried out was likely to lead the Ombudsperson to arrive at wrong conclusions or to cause her any injury.

11. In Judgment 2552, under 3, the Tribunal pointed out that when an accusation of harassment is made, an international organisation must both investigate the matter thoroughly and accord full due process and protection to the person accused. The organisation's duty to a person who makes a claim of harassment requires that the claim be investigated both promptly and thoroughly, that the facts be determined objectively and in their overall context (see Judgment 2524), that the law be applied correctly, that due process be observed and that the person claiming, in good faith, to have been harassed not be stigmatised or victimised on that account (see Judgments 1376, under 19, 2642, under 8 and 3085, under 26).

12. The Tribunal finds that there is no evidence in the file that the complainant was given an opportunity to comment on some of the allegations of her former supervisor in order, if necessary, to rectify some items of information or express her disagreement. The Tribunal considers that the complainant should have been allowed to see the testimony in order that she might challenge it, if necessary by furnishing evidence. Since this was not the case, the Tribunal finds that the adversarial principle was not respected (see Judgment 3065, under 7 and 8).

13. It follows from the foregoing, without there being any need to examine the complainant's other pleas, that the decision of 19 June 2013, and likewise the decisions of 16 December 2009 and 4 February 2010, must be set aside.

14. In view of the time which has elapsed since the period when the alleged harassment took place, the Tribunal considers it inadvisable to remit the case to the EPO in order that it conduct a further investigation.

However, the complainant is entitled to compensation for the moral injury she suffered on account of the decisions which have been set aside. The Tribunal sets the damages due to her in the amount of 10,000 euros.

15. The complainant also takes issue with the length of the internal appeal proceedings, which lasted almost three years. The Tribunal finds that this was indeed excessively long. The EPO has failed to explain why it took more than two years, from the date on which the first internal appeal was lodged, to submit its single reply to the complainant's two appeals. The Tribunal considers that she should therefore be awarded 1,000 euros in moral damages. Since the complainant has succeeded in part, she is also entitled to costs, which the Tribunal sets at 1,000 euros. All other claims must be dismissed.

DECISION

For the above reasons,

1. The decisions of 16 December 2009, 4 February 2010 and 19 June 2013 are set aside.
2. The EPO shall pay the complainant 10,000 euros in compensation for the moral injury resulting from the decisions which have been set aside.
3. It shall pay her 1,000 euros in moral damages for the excessive length of the internal appeal proceedings.
4. It shall also pay her 1,000 euros in costs.
5. All other claims, insofar as they are not moot, are dismissed.

In witness of this judgment, adopted on 9 November 2015, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 February 2016.

(Signed)

CLAUDE ROUILLER PATRICK FRYDMAN FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ