H. (No. 3)

v.

EPO

125th Session **Judgment No. 3967**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr J. L. H. against the European Patent Organisation (EPO) on 18 July 2012 and corrected on 12 September, the EPO's reply of 20 December 2012, the complainant's rejoinder of 8 April 2013, corrected on 18 April, and the EPO's surrejoinder of 8 August 2013;

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 considers that he was a victim of harassment, or at least of straining, by his director who issued a warning letter regarding his performance and set new productivity targets which he was to achieve in 2004.

On 12 August 2004 the complainant's director issued a warning letter under Section A(6) of Circular No. 246, entitled "General Guidelines on Reporting", regarding the complainant's productivity in the first few months of 2004, stating, inter alia, that the complainant was in danger of receiving a marking of less than "good" in his next staff report. During the period in question the complainant experienced a personal tragedy.

Considering that the warning letter should not have been issued in light of his personal circumstances, which were known to the director, the complainant wrote to the Vice-President of Directorate-General 1 (DG1) on 16 June 2005 formally protesting against the behaviour of his director and requesting, specifically: (1) the withdrawal of the warning letter from his personnel file; (2) an official explanation for the abusive behaviour to which he was subjected when in a particularly delicate situation; and (3) a credible guarantee that he would not be subjected to abuse of that or any other nature for as long as he remained in the service of the EPO.

In a letter dated 26 July 2005, the Vice-President of DG1, while expressing his regrets for the complainant's personal tragedy and his hopes for his early recovery to full health, stated that he was satisfied that, from a formal point of view, the matter had been correctly handled in accordance with Circular No. 246. However, he suggested that the complainant meet with his director, in the presence of the EPO's medical adviser and, if he so wished, a staff representative, to resolve the problems and misunderstanding that had occurred.

As he was not satisfied with the response, the complainant filed an internal appeal with the President of the Office on 14 September 2005. He insisted that the issuance of the warning letter was inappropriate, insensitive and served only to increase the pressure to which he had been subjected and to undermine his dignity. He specifically challenged the refusal to withdraw the warning letter and "the further abusive behaviour of the director".

On 18 November 2005 the complainant was informed that his appeal had been rejected by the President of the Office, who considered that the warning letter had been lawfully issued under Circular No. 246. The appeal was forwarded to the Internal Appeals Committee (IAC) for an opinion.

On 20 March 2006 the complainant's director withdrew the warning letter. The complainant maintained his appeal, arguing that the matter of "the further abusive behaviour of [his] director" had not yet been formally addressed. Moreover, as the director had made a comment in the complainant's final staff report for the period 2004-

2005, which the complainant perceived as negative, he initiated a formal harassment procedure which resulted in another internal appeal (RI/84/10) and a separate complaint before the Tribunal, on which the judgment is delivered in public this day (see Judgment 3965).

In a submission dated 22 January 2009 before the IAC, the complainant's legal representative, declaring the original appeal to be settled to the extent that the contested warning letter had been withdrawn, formulated a request that the conduct of the director be qualified as a "grave lack of respect for the [complainant]'s dignity" under Article 2(1) of Circular No. 286, and requested moral damages and costs.

The IAC held two hearings on 18 June 2009 and 21 April 2010. In its majority opinion of 1 March 2012, it first stated that, contrary to the Organisation's position, the warning letter is an appealable decision that can be challenged *per se*. It considered that, although the warning letter had been withdrawn, the complainant's initial appeal was admissible to the extent that it was directed against the refusal to withdraw it, and that the warning letter should have been withdrawn *ab initio*. It also held that the request for a declaration that the director had offended the complainant's dignity was admissible to the extent that it was consistent with the complainant's original request with regard to "further abusive behaviour".

The majority of the IAC concluded that the director's actions, which the complainant sought to challenge, did not constitute a violation of his dignity amounting to harassment. According to the majority, it was necessary "to examine the extent to which the director acted in a specifically blameworthy manner, since harassment must always entail some harmful intent (see Tribunal Judgment [...] 2521, consideration 12, [...]). The requirement for intent is also clear from the non-exhaustive list in Article 2(1) of Circular No. 286 [on the 'Protection of the dignity of staff']". The majority of the IAC concluded that, on the evidence, the director had no malicious intent in the actions which were complained of, and his actions did not amount to abusive misconduct that could be deemed to have offended the complainant's dignity constituting harassment.

The minority of the IAC relied on a letter of 9 December 2010 in which the Vice-President of DG1 admitted that "the management should have shown a higher degree of sensitivity towards [the complainant's] personal situation" at the time and regretted the inconvenience and distress which the actions had caused him. The minority of the IAC further stated that "the drop of productivity following the warning letter and the three days sickness in October indicate[d] that this event really caused the [complainant] distress (as acknowledged by [the Vice-President of DG1]), which should be compensated by moral damages". The minority concluded that the complainant should therefore be awarded 10,000 euros in moral damages and that his legal costs in the internal appeal proceedings should be paid.

In the final decision dated 25 April 2012, which was taken on behalf of the President of the Office, the appeal was rejected as irreceivable on the grounds that the issuance of a warning letter did not constitute an act adversely affecting an official. Notwithstanding this decision, the EPO offered an *ex gratia* payment of 1,000 euros, as recommended by the IAC majority. The EPO also considered that the fact that one of the IAC members, who gave an opinion on the appeal, was not present at the oral hearing held on 21 April 2010 did not amount to a procedural violation. That is the impugned decision.

The complainant, in addition to requesting the Tribunal to set aside the impugned decision, seeks material damages calculated as the difference between the net invalidity pension he received as of 1 February 2008 and the salary he would have received if he had remained in active service, until either the date on which the conditions for his retirement would have been fulfilled, or the date on which the Tribunal's judgment will be executed by the EPO. He also claims moral damages, interest and costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable for want of any act causing injury and for non-exhaustion of the internal means of redress. Subsidiarily, it contends that the complaint is unfounded.

CONSIDERATIONS

1. The EPO applies for the joinder of this complaint with the complainant's first and second complaints. The Tribunal has held, in consideration 6 of Judgment 3965, which is also delivered in public this day, that the first complaint cannot be joined with the present complaint because they do not raise the same issues of fact and law. In consideration 1 of Judgment 3966, which is also delivered in public this day, the Tribunal has held that, for the same reasons, the second complaint cannot be joined with this complaint. Consequently, the application for joinder in this case is dismissed.

2. The complainant applies for oral proceedings. He asks to be heard "with respect to Article V of the Statute of the Tribunal, [...] since his cases are of a personal and highly sensitive nature, because the[y] have taken far too long a time; and because his rights were intentionally infringed". Article V relevantly states that "[t]he Tribunal, at its discretion, may decide or decline to hold oral proceedings, including upon request of a party". The EPO recalls that the Tribunal stated, in Judgment 619, consideration 1, and Judgment 1661, consideration 2, for example, that a request for oral proceedings is exceptionally granted and usually serves the purpose of gathering additional evidence, where necessary, to help to resolve issues before it and that a hearing is unnecessary where a complainant has already had ample opportunity to state her or his case. The EPO submits that the complainant had ample opportunity to be heard since he presented evidence on every aspect of the case when the IAC conducted hearings on 18 June 2009 and 21 April 2010, with the assistance of his legal representative. The EPO asserts that the evidence and submissions are sufficient to enable the Tribunal to assess the possible impact of the actions of which the complainant complains, including the effects, if any, on his health condition.

It is observed that the IAC fully documented the evidence which was given at the two hearings that it conducted, the events which occurred after each hearing and the oral submissions which the legal representatives of both parties made. The Tribunal is satisfied that these, together with the documents, reports and written submissions

on file, are ample and sufficiently detailed to permit it to determine the issues which arise on this complaint. The application for oral proceedings is therefore dismissed.

3. The complainant initiated his internal appeal, which led to the present complaint, in the letter to the President dated 14 September 2005. The Organisation received it on 19 September 2005. In that letter, the complainant referred to his previous letter of 16 June 2005 to the Vice-President of DG1 by which he had formally requested the withdrawal of the warning letter of 12 August 2004. By this warning letter, his director had notified him that he was in danger of receiving a marking of less than "good" for his productivity. He stated that, issued in the context of his personal circumstances at the time, the warning letter was totally unacceptable; constituted a serious error of judgment by his director; "ha[d] compromised [his] grieving process to an extent still to be fully gauged"; and "serve[d] only to undermine [his] dignity at a time when [he] was already heavily burdened". The complainant also protested against his director's "unofficial attempt to force [him] to achieve completely unrealistic productivity levels". He referred to the request he made in the letter of 16 June 2005 for "an official explanation [for the] abusive behaviour [he received]" from his director.

On 20 March 2006 the complainant's director withdrew the warning letter, and the notification of the withdrawal was subsequently attached to the complainant's staff report for the reporting period 2004-2005. In his complaint, the complainant states that, in his internal appeal submission of 22 January 2009, his legal representative "declared the appeal to be settled to the extent that the contested [...] warning [letter] had since been withdrawn".

4. The complainant seeks an order to set aside the impugned decision dated 25 April 2012. He contends that the IAC wrongly evaluated the facts when it concluded that, since there was no malicious intent by his director, his actions could not constitute a violation of his (the complainant's) dignity amounting to harassment; as well as when it concluded that there was not a very strong causal relationship between that behaviour, the complainant's illness and his subsequent invalidity.

The complainant also seeks moral damages for the breach of the Organisation's duty of care and the affront to his dignity amounting to harassment. He finally claims material damages, interest and costs, as well as an award of moral damages for the inordinate delay in the internal appeal proceedings.

5. As the complainant did not put forward the claim for material damages mentioned in the foregoing consideration in his internal appeal, it is irreceivable under Article VII, paragraph 1, of the Tribunal's Statute. It will be dismissed on the ground that he had failed to exhaust internal remedies in relation to that claim.

Likewise, the claim for the breach of the duty of care is also irreceivable under Article VII, paragraph 1, of the Tribunal's Statute. It is outside the scope of the internal appeal as it was raised for the first time by the complainant in the present complaint. The complainant did not claim in the internal appeal that his director, or by extension the EPO, breached the duty of care towards him. However, the majority of the IAC, having considered that the director's actions did not constitute an offence to the complainant's dignity amounting to harassment, concluded that the actions complained of amounted to a breach of the director's duty of care towards the complainant. This finding clearly went beyond the scope of the internal appeal and was not addressed in the impugned decision.

6. The complainant mainly argues that the opinion of the majority of the IAC was flawed. He asserts that it is clear that by issuing the warning letter and by setting the unrealistic production targets for him to implement the warning at the end of October 2004, the director breached his duty of care. The impugned decision, however, did not refer to this assertion; neither did it refer to the complainant's allegation of harassment. It merely rejected the IAC's majority opinion according to which the issuance of the warning letter constituted an act which adversely affected the complainant. It is also noted that, at the time when the impugned decision was issued, the lawfulness of the warning letter and the new production targets were no longer live issues as they had been withdrawn.

7. The internal appeal was based mainly on the complainant's plea that by issuing the warning letter the director violated his dignity. The plea is unfounded.

The actions of issuing the warning letter and setting the new production targets undoubtedly caused the complainant distress, as was acknowledged in a letter from the Vice-President of DG1 dated 9 December 2010 on which the minority of the IAC relied. That distress could possibly have been avoided with a more sensitive approach from the outset given the complainant's delicate and difficult personal circumstances at the time. It is obvious that the director was primarily concerned with productivity. However, the Tribunal does not accept that those actions violated the complainant's dignity.

8. The fatal flaw of the IAC's majority opinion was that it considered that the warning letter was an appealable decision *per se* and that it could issue an opinion on related claims. The Tribunal has in the meantime clarified that this was an erroneous approach. The Tribunal determines that the actions complained of were provided for by, and conform to, the EPO's internal rules and procedures. The director had the power under the rules to issue a warning letter. Furthermore, the warning letter provided for in Section A(6) of Circular No. 246 is not an act that could be challenged before the Tribunal as it is merely a step in the process that culminates in a staff report (see Judgments 3806, consideration 6, 3697, consideration 5, 3629, consideration 3, 3512, consideration 3, and 3433, consideration 9).

9. The claim for moral damages for the excessive delay in the internal appeal proceedings is well founded as it is clear that the EPO breached its obligation to ensure that its internal procedure moved forward with reasonable speed (see, for example, Judgment 2197, consideration 33). The complainant's letter dated 14 September 2005 became the basis of his internal appeal. The EPO informed the complainant, by letter dated 18 November 2005, that his appeal had been submitted to the IAC. The IAC received a copy of it on the same day. The EPO did not submit its position paper until 2 March 2007. The IAC conducted a first hearing more than two years later, on 18 June

2009. There was a second hearing on 21 April 2010. The IAC issued its opinion on 1 March 2012 and the impugned decision was issued on 25 April 2012. That period of more than six years in the internal appeal proceedings constituted excessive delay, even taking into consideration the complainant's illness and the efforts which were made to amicably settle the matter. For this, the complainant will be awarded moral damages in the amount of 8,000 euros, particularly given the length of the delay and the impact of that delay on him in his personal circumstances. Since the complainant has succeeded in part, he will also be awarded costs in the amount of 3,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 8,000 euros in moral damages.
2. The EPO shall pay the complainant costs in the amount of 3,000 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 8 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ