L. (No. 3)

v.

EPO

129th Session **Judgment No. 4263**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Ms M. L. against the European Patent Organisation (EPO) on 19 April 2013, corrected on 4 June, the EPO's reply of 8 November 2013, the complainant's rejoinder of 6 February 2014 and the EPO's surrejoinder of 20 May 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 her performance management report for 2009.

At the material time, the complainant was a principal director in Directorate-General 1 (DG1) of the European Patent Office, the EPO's secretariat. On 19 May 2010 the Vice-President of DG1 (VP1), who was the complainant's reporting officer, completed her performance management report for 2009. He rated her performance as follows: "good" for management results, "very good" for quality, "good" for productivity, "good" for aptitude, and "good" for attitude. Her overall rating was "good". The complainant, who disagreed with that assessment, met with VP1 on 25 June 2010 to discuss the report. No agreement was reached, but VP1 asked her to update a document annexed to the report

detailing her achievements during the reporting period, so as to include the results for November and December 2009. On 30 June 2010 VP1 sent her an amended version of the report in which the various performance ratings were the same but all references to the annex were deleted. He observed that the complainant had not updated the annex within the agreed time-frame.

On 6 July 2010 the complainant sent a letter to the President of the Office asserting that her 2009 performance management report was formally and substantively flawed. In accordance with section 4.5(7) of Circular No. 306, which deals with "Performance management for Principal Directors", she asked the President to take a decision on the matter. By a letter of 3 September 2010 she was informed that, following an initial examination of the case, the President had concluded that her requests could not be granted and had therefore referred the matter to the Internal Appeals Committee (IAC) for an opinion.

The IAC considered the appeal together with four other appeals lodged by the complainant, one of which concerned allegations of harassment against VP1. It held a hearing on 21 May 2012 and issued a single opinion dealing with all five appeals on 5 December 2012. The IAC found that although the conduct of VP1 might on some occasions have been inappropriate and indicative of poor management decisions, there was insufficient evidence to establish mobbing or harassment on his part. It considered that, although the complainant had previously been reluctant to initiate a procedure before the ombudsman, she ought now to be given an opportunity to have her allegations of harassment properly investigated. Regarding the 2009 performance management report, the IAC found that her appeal was premature as she had filed it before the report had been finalised. It therefore declined to examine the content of the report. The IAC recommended that the complainant be given the right to request an ombudsman procedure to investigate her allegations of harassment, in which case the appeals concerning her performance management reports (including the 2009 report) could be examined in light of the results of that investigation. In the event that she chose not to resort to an ombudsman procedure, it recommended that the Office offer her a lump sum payment of 15,000 euros in full

settlement of her claims relating to her performance management reports for 2008, 2009 and 2010. The IAC also recommended that she be awarded costs.

The complainant filed this complaint on 19 April 2013, relying on Article VII, paragraph 3, of the Statute of the Tribunal. She indicated on the complaint form that the Office had failed to take a decision, within the 60-day period mentioned in that provision, on her internal appeal lodged on 6 July 2010. However, although she was not yet aware of it, the President had in fact taken a decision on her five appeals on 18 April 2013, rejecting all her claims. With respect to her appeal against the 2009 performance management report, the President considered that the report sent to her by VP1 on 30 June 2010 following their meeting of 25 June had to be considered as final.

The complainant asks the Tribunal to "correct" her 2009 performance management report as indicated in her brief, and to award her a substantial sum in moral damages, in view of the fact that she will have retired by the time the judgment is delivered, so that the amendment of her 2009 report would no longer have any practical effect in terms of her career and professional standing. She also claims costs.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant commenced working for the EPO in January 1988. In August 2004 she was appointed Principal Director of the Pure and Applied Organic Chemistry cluster in DG1 under a five-year fixed-term contract. These proceedings concern the complainant's 2009 performance management report.

2. This complaint, filed on 19 April 2013, is the third of six complaints filed by the complainant that are presently before the Tribunal. Neither the complainant nor the EPO sought the joinder of this complaint with the other five. While each of the six complaints broadly relates to the same continuum of events with one of the central characters being VP1, mainly each concerns discrete events and each

raises different legal issues. This complaint will not be joined with any of the others, consistent with the Tribunal's case law (see, for example, Judgment 4114, consideration 2) with, additionally, the benefit of creating greater focus on the relevant facts and applicable law attending this complaint and each of the other complaints.

3. It is convenient to note at the outset that the role of the Tribunal in challenges to the assessment of the performance of staff of international organisations is a limited one and does not involve reassessment of performance by the Tribunal (see, for example, Judgments 3228, consideration 3, and 3692 consideration 8). Yet, as discussed shortly, the thrust of much of the complainant's brief is that in relation to a range of matters assessed, the assessment was wrong and the ratings too low.

4. The arguments of the complainant on the merits are advanced under several headings. The first is that there was a general irregularity attending the first 2009 performance management report signed on 19 May 2010 by the reporting officer, VP1 (the first 2009 PMR). The second is that there was a divergence between the evaluation in the first 2009 PMR and the annex to it. The third argument concerns the contention that there had been no final assessment meeting. The fourth argument is that there were legal flaws in the corrected version of the performance management report signed by VP1 on 30 June 2010 (the second 2009 PMR). The fifth argument concerns what are said to be material errors of assessment in the first and second 2009 PMRs. This general heading is followed by what are, in substance, subheadings concerning the assessment of the complainant for "Management results", "Quality", "Productivity", "Aptitude", "Attitude" and the overall performance assessment.

5. The substance of the fifth argument is a critique of the assessment made mainly together with a contention that a more favourable assessment should have been made. It is unnecessary for the Tribunal to analyse this argument for reasons already mentioned.

6. The first argument that there was a general irregularity attending the first 2009 PMR is unfounded. The point made is that the first 2009 PMR evaluated objectives for the period January to October 2009 whereas the reporting period was 1 January 2009 to 31 December 2009. This is factually correct but this is not, as the complainant contends, a "fatal material error which inevitably leads to the illegality of the PMR". That is because this error was corrected in the second 2009 PMR and, more importantly and as pointed out by the EPO in its reply, the second 2009 PMR is the document challenged by the complainant in these proceedings, putting aside whether a challenge to the first 2009 PMR is receivable in any event.

7. The second argument that there was a divergence between the evaluation in the first 2009 PMR and the Annex to it is also unfounded for the reasons set out in the latter part of the preceding consideration.

8. The third argument concerns the contention that there had been no final assessment meeting before, it appears from the complainant's brief, the first 2009 PMR was signed. Circular No. 306 sets out the purpose and role of performance management of Principal Directors and the methodology for creating and completing performance management reports. It does provide, in section 4.5(1) and (7) for meetings between the staff member being assessed and the reporting officer though there is no explicit provision for a "final assessment meeting". In the present case there were, in fact, two meetings between the complainant and her reporting officer before the first 2009 PMR was signed and another after it was and before the second 2009 PMR was signed. No contravention of Circular No. 306 is demonstrated and this argument is unfounded.

9. The fourth argument is that there were legal flaws in the corrected version of the second 2009 PMR. This argument turns on the non-inclusion of an annex to this second version and the deletion of references to any annex in the report itself in contradistinction to references in the first 2009 PMR. The non-inclusion of an annex is unexceptionable. Firstly there is nothing in Circular No. 306 that would require such a document. Secondly, VP1 requested the complainant,

at a meeting on 25 June 2010, to provide an amended annex by 29 June 2010. No document was forthcoming by the requested time. VP1 was entitled to do what he then did, namely sign the second 2009 PMR on 30 June 2010. An allied argument was that VP1 did not substantiate the assessments he made or the reasoning underlying them. Circular No. 306 does not require, other than in limited circumstances presently not relevant, reasons.

10. The complainant has not established any legal error in the processes leading to and the making of the second 2009 PMR and, accordingly, this complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 24 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ