L. (No. 5)

v.

EPO

129th Session **Judgment No. 4265**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Ms M. L. against the European Patent Organisation (EPO) on 5 July 2013, corrected on 2 August, the EPO's reply of 11 November 2013, the complainant's rejoinder of 17 February 2014 and the EPO's surrejoinder of 23 May 2014;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the decision to dismiss her allegations of harassment.

In March 2010 the complainant, who was then Principal Director of the Pure and Applied Organic Chemistry cluster (PAOC) in Directorate-General 1 (DG1), submitted a grievance to the President of the European Patent Office, the EPO's secretariat, alleging harassment by the Vice-President of DG1 (VP1). She accused VP1 of showing disregard for her dignity at work and undermining her authority as a manager, thereby damaging her reputation, referring to a series of specific incidents that had occurred since 2007. By way of relief, she asked the President to take immediate action against VP1, including the disciplinary measure

of a written warning. In the event that her requests were not granted, she asked that the matter be referred to the Internal Appeals Committee (IAC) and claimed moral and punitive damages, as well as costs.

At the time when that grievance was filed, the formal procedure for dealing with harassment claims was being revised. Circular No. 286, which set out the EPO's policy on the "protection of the dignity of staff" and provided informal and formal procedures for resolving harassment-related grievances, had been suspended by the President. Pending the adoption of a new procedure, the informal means for resolving harassment-related grievances, as set out in Circular No. 286, were retained, but formal harassment-related grievances were to be submitted directly to the President. The Office continued to use the services of an external ombudsman and formal grievances were to be dealt with on a case-by-case basis.

In her response to the complainant's grievance, the President, referring to the Tribunal's case law, pointed out that the complainant had no right to demand that disciplinary action be taken against another staff member. Noting that several of the incidents mentioned in the grievance were already the subject of other internal appeals, she asked the complainant to indicate whether she would withdraw her grievance or whether she would like her allegations to be examined by an ombudsman. The complainant replied that she wanted the matter to be referred directly to the IAC.

The IAC joined this appeal with several other appeals lodged by the complainant and, after hearing the parties, issued a single opinion on 5 December 2012. It held that the evidence was insufficient to support a claim of harassment or mobbing, though it found, in relation to one of the incidents on which she relied, that VP1's conduct had injured her dignity. The IAC considered that the complainant had valid grounds for rejecting the ombudsman procedure and that she should be given a further opportunity to have her claims investigated under the new procedure that the Office intended to introduce, if she so wished.

In a decision of 18 April 2013, the President accepted the IAC's finding that there was insufficient evidence to support the claim of harassment. In these circumstances, he concluded that there was no

reason to offer the complainant the possibility of an investigation under the new procedure, nor was there any reason to award her damages. That is the decision that the complainant impugns in these proceedings.

The complainant asks the Tribunal to award her 50,000 euros in moral damages for harassment and for the resulting harm to her dignity, an additional 20,000 euros in moral damages for the EPO's failure to properly investigate her harassment grievance and its failure to provide an effective remedy in a reasonable time, and 10,000 euros in costs for the proceedings before the IAC as well as the present proceedings.

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 PAOC cluster in DG1 under a five-year fixed-term contract. Her immediate supervisor was VP1. In these proceedings the complainant contends she had been harassed by VP1.

2. This complaint, filed on 5 July 2013, is the fifth 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. The formal complaint of harassment was initiated by a letter dated 8 March 2010 from the complainant's lawyer to the President of the Office. The essential elements of the conduct complained of were fairly summarised by the EPO in its reply. The conduct was:

(a) the deletion of two important support posts in 2007 and 2008 in the complainant's cluster;

(b) the reduction in the working hours of the cluster business administrator in the complainant's cluster in 2007;

(c) the withdrawal in April 2008 of the decision to give the complainant temporary lead of the Biotechnology cluster;

(d) the reprimand of the complainant in the presence of a third party in April 2008;

(e) the delays in arranging mediation proceedings in November 2008 and "VP1's clear lack of interest in permanently resolving conflict";

(f) the unwarranted interference in November 2008 in internal principal directorate matters without consulting the complainant;

(g) the preparing of a formally and substantively incorrect performance assessment for the 2008 reporting period;

(h) the inconsistent information between April and September 2009 concerning the complainant's transfer to Principal Directorate Quality Management (PDQM).

4. It is unnecessary to recount, at this point, the path the consideration of the grievance took before a decision of the President was made and communicated to the complainant on 18 April 2013 effectively dismissing her appeal. Suffice it to note that while the complainant had some limited success on procedural issues before the IAC on her claim of harassment, it nonetheless recommended that her appeal, on this matter, be dismissed but with the proviso that if a procedural course the IAC proposed was not taken up by the complainant or was resisted by the EPO, the complainant be awarded, on this grievance, additional moral damages of 25,000 euros.

5. The complainant notes in her brief that in 2005 the EPO introduced Circular No. 286 (the Circular) which was entitled "Protection of the dignity of staff". The Circular commenced with Part I entitled "Policy on the protection of dignity of staff" and contained what was, in effect, a preamble in which it was said that "[h]arassment and

associated behaviour disregard a person's dignity". Part II contained "Guidelines on the protection of dignity of staff". It contained a definition of harassment in the following terms:

> "'Harassment' means any behaviour that undermines the dignity of a protected person. A protected person's dignity is undermined if he is subjected, for example, to any of the following:
>
> (a) persistent or recurring behaviour which is inappropriate, offensive, intimidating, hostile, abusive, demeaning, malicious or insulting
>
> (b) persistent unjustified criticism
>
> (c) vexatious changes in duties or responsibilities."

6. The complainant also notes in her brief that the Circular was suspended in May 2007 (provisionally) and June 2007 (confirmation of provisional suspension) by Communiqués No. 23 and No. 24 respectively. As ultimately transpired and after the pleas in these proceedings were complete, the Tribunal ordered in Judgment 3522 that the decisions to suspend Circular No. 286 embodied in the two Communiqués were set aside, which had the effect of reinstating Circular No. 286 (see considerations 4 and 5 of that judgment). It is unnecessary to delve into the question of what the legal status of the Circular was during the period in which the events occurred founding the complainant's grievance. The EPO does not say in its pleas that the definition of harassment in the Circular had no application in the relevant period in the sense that it did not encapsulate what conduct might constitute harassment. It did. A key element of harassment is the perception the person the object of the conduct "may reasonably and objectively have of acts or remarks liable to demean or humiliate him/her" (see Judgment 3318, consideration 7).

7. Several other matters emerge from the case law. Judgment 3318, just referred to, says, citing earlier authority, that there is no need to prove the perpetrator of the acts complained of intended to engage in harassment, an allegation of harassment has to be borne out by specific facts and the burden of proof is on the person who pleads it. That judgment also says, citing earlier authority, that an unlawful decision or inappropriate behaviour is not enough to prove that harassment has occurred. In addition, behaviour will not be characterised as harassment

or mobbing if there is a reasonable explanation for the conduct in question, though an explanation which is *prima facie* reasonable may be rejected if there is evidence of ill will or prejudice or if the behaviour in question is disproportionate to the matter which is said to have prompted the course taken (see Judgment 2524, consideration 25).

8. Finally, individual events may, over time, evidence harassment even if each of the particular individual events may be capable of being viewed more benignly (see, for example, Judgment 3485, consideration 6). However for the moment, it is convenient to look individually at each of the matters raised by the complainant in her letter of 8 March 2010 summarised in consideration 3, above, before assessing the consequences of considering them cumulatively.

9. The first matter concerns the deletion of two support posts in 2007 and 2008 in the complainant's cluster and the second and related matter concerns the reduction in the working hours of the cluster business administrator in the complainant's cluster in 2007. In its reply, the EPO explains how both the removal of the two posts (a secretary post and a cluster business administrator post) flowed from a decision of the management committee (a collective body made up of the President, five Vice-Presidents and three Principal Directors) and the consequential decision of the Principal Director of Means to allocate another cluster business administrator only part-time to the complainant's cluster. In her rejoinder, the complainant does not challenge the basics of this explanation but rather focuses on the way in which VP1 went about making the changes. However, as the EPO points out in its surrejoinder, behaviour will not be characterised as harassment "if there is reasonable explanation for the conduct in question" (see Judgment 2524, consideration 25). In this case, there was and it cannot be inferred on the available facts that VP1 was acting with ill will or prejudice.

10. The third matter concerns the withdrawal in April 2008 of the decision to give the complainant temporary lead of the Biotechnology cluster. The circumstances concerning this matter are discussed in Judgment 4261, also delivered in public this day. Suffice it to note that, in limited respects, they do evidence harassment in the sense that the

complainant's dignity was not respected. However the complainant is awarded damages for that conduct in Judgment 4261.

11. The fourth matter concerns the alleged reprimand of the complainant in the presence of a third party in April 2008. This relates to a meeting on 24 April 2008 between the complainant and VP1 that was also attended by the Head of the Central Unit Line Management Support. In the circumstances, which include the emotional and negative reaction the previous day of the complainant to being told of the decision referred to in the preceding consideration, the attendance of another person was unexceptionable as was what transpired. While the complainant seeks to cast doubt on a written summary of the meeting relied on by the EPO, her reasoning is not persuasive.

12. The fifth matter concerns the delays in arranging mediation proceedings in November 2008 and "VP1's clear lack of interest in permanently resolving conflict". Even accepting, without reservation, the complainant's analysis of the position adopted by VP1 (and the EPO in its pleas does not) in the mediation process, it does not evidence harassment. Broadly described, mediation is a process whereby an attempt is made involving a third party to resolve a dispute between the parties to the mediation. In the present case, mediation was proposed by the President. VP1 participated in that process. Even if he did so unenthusiastically this does not constitute harassment.

13. The sixth matter concerns the alleged unwarranted interference by VP1 in November 2008 in internal principal directorate matters without consulting the complainant. As explained in the letter of 8 March 2010, the complainant challenges the involvement of VP1 in the process involving a decision by the cluster business administrator that he no longer wished to work in the principal directorate and thus not work in the complainant's cluster. Even if VP1 could have involved the complainant in discussions about the attitude of the cluster business administrator earlier and at a time when the complainant could have been more actively involved in addressing the concerns of the individual occupying the position, this conduct does not evidence harassment.

14. The seventh matter concerns the preparing of an allegedly formally and substantively incorrect performance assessment for the 2008 reporting period. The circumstances concerning this matter are discussed in Judgment 4262, also delivered in public this day. Suffice it to note that, of themselves, they do not evidence harassment.

15. The eighth matter concerns the allegedly inconsistent information between April and September 2009 about the complainant's transfer to PDQM. The essential facts are not in dispute. In April 2009, VP1 asked the complainant whether she would be interested in a transfer to PDQM. The President decided that this position should be filled by competition. The complainant came to know of this but was told by a colleague rather than by VP1. The complainant did not then apply for the position. But no suitable candidate emerged from the competition and, ultimately, the complainant was transferred to the post with her consent. Part of her case was that rumours circulated within the organisation about this matter. However the complainant accepts, on her version of the events, the rumours were started by someone other than VP1 though close to him. The essence of the allegations of harassment on this issue was that VP1 misled the complainant and did not inform her that the President had decided to open the post to directors for competition nor, it appears, that a little later two Principal Directors were transferred directly to existing posts. This conduct did not constitute harassment.

16. A ninth matter should be added to the summary set out in consideration 3, above, namely the enquiries made by VP1 of directors of the complainant's directorate about "allegations of discontent among them with regard to [the complainant's] leadership". Again, the essential facts are not in dispute. At the beginning of 2010, VP1 undertook individual meetings with directors in the complainant's cluster. He told the complainant of his intention to do so in writing on 11 January 2010 and 19 January 2010. The stated purpose of the meetings (in the letter of 11 January 2010) was for VP1 to establish whether and to what extent "this" was the case. The word "this" picked up an earlier reference in the letter to "there seems to be some unrest and unhappiness" in the cluster.

17. The essence of the complainant's grievance is that the conduct of VP1 was contrary to the terms of a mediation agreement reached in November 2008 and that he should have discussed with her first the "alleged rumours of unrest and dissatisfaction". She also said that after the meetings had occurred (and before), she was provided with no information as to the content of the meetings, the reasons they were undertaken or any conclusions VP1 had drawn. It is not correct to say the complainant was not told of the purpose of the meetings. As indicated above in consideration 16, she was. Moreover it was unexceptionable for VP1 to engage in what was essentially fact-finding before discussing the matter further with the complainant.

18. However the subsequent conduct of VP1 can be criticised. In her brief, the complainant says that upon returning from sick leave and at a meeting on 24 April 2010, she asked him "to inform [her] about the reasons and the result of his 'inquiry'. His answer was that, since [she] had not been negatively affected, there was no need to inform [her]." The complainant's account of what was said at this meeting was not challenged by the EPO in its reply or in its surrejoinder. It is consistent with the nature of their relationship which fairly clearly was a strained one. The complainant's request was entirely reasonable. At best, VP1 was telling the complainant in an entirely summary if not dismissive way he had discovered no, or no significant, dissatisfaction with her leadership. He was otherwise refusing to discuss the matter further. In the circumstances, this was an entirely unjustified curt response about a matter of considerable importance to the complainant. The response did not respect the dignity of the complainant.

19. Viewing all the events discussed in the preceding considerations collectively, it cannot be said that the complainant has established a course of conduct that can be characterised as sustained or ongoing harassment. However she is entitled to moral damages for the conduct referred to in the preceding consideration. They are assessed in the sum of 10,000 euros.

20. Two further matters raised by the complainant need to be addressed. One is whether the President failed to motivate his decision rejecting the recommendations of the IAC and failed to give proper consideration to the recommendations. The Tribunal has read the opinion of the IAC and the response of the President contained in the letter of 18 April 2013 and is satisfied the response is adequate. The other matter is the alleged delay in investigating a complaint of harassment. The formal complaint of harassment was made on 8 March 2010. It took until May 2010, and after correspondence between the complainant and the EPO, to resolve the appropriate procedure and for the harassment complaint to be referred to the IAC. The IAC then had to consider not only the complaint of harassment but also a number of other grievances of the complainant. While the period taken by the IAC was lengthy, it was not unreasonable, particularly having regard to the multitude of factual matters raised by the complainant. Nor was the time taken by the President to digest and respond to the IAC's opinion unreasonable in all the circumstances.

21. As the complainant has been partially successful in these proceedings, she is entitled to an order for some costs, which are assessed in the sum of 1,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant moral damages in the amount of 10,000 euros.

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 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