E. (Nos. 13 and 14)

v.

EPO

137th Session **Judgment No. 4798**

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Ms M. E. against the European Patent Organisation (EPO) on 18 June 2019 and corrected on 7 August, the EPO's reply of 18 November 2019, the complainant's rejoinder of 17 February 2020 and the EPO's surrejoinder of 8 June 2020;

Considering the fourteenth complaint filed by the complainant against the EPO on 12 July 2019 and corrected on 23 August, the EPO's reply of 8 January 2020, the complainant's rejoinder of 27 April 2020 and the EPO's surrejoinder of 29 September 2020;

Considering the letter of 12 January 2023 by which the EPO informed the Registry of the Tribunal that it had paid 100 euros in moral damages to the complainant for the irregular composition of the Appeals Committee, as was done in Judgment 4550;

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

Having examined the written submissions;

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

The complainant contests the closure of an area of competence in the Berlin sub-office, and her reassignment.

In 2008, the European Patent Office, the EPO's secretariat, discussed the restructuring of Directorate-General 1 and the future direction of its Berlin sub-office. It developed the concept of "area of competence", which referred to the concentration of all work relating to a technical field with a single group of examiners working on one site of employment where Directorate-General 1 was active. In December 2008, the staff was informed of the decision to create and implement the area of competence in the Berlin sub-office.

On 9 November 2011, the President of the Office introduced a procedure to support the implementation of areas of competence in Directorate-General 1 ("the implementation procedure"). It provided inter alia an "Implementation Resolution Process" if the areas of competence implementation plans led to complaints. It provided that if the complaint could not be resolved by the parties in disagreement, any party may submit the complaint to the Vice-President of Directorate-General 1, in writing, one month after the publication of the final implementation plan. The Vice-President shall then submit the complaint to the Area of Competence Implementation Support Committee with the request to mediate or provide a recommendation. After receiving a closure report from the Committee, the Vice-President takes a decision on the complaint. The President's decision also provides that the "creation and implementation of an [area of competence] shall be stopped until [the Vice-President of Directorate-General 1's] decision has been communicated to all parties concerned".

On 10 October 2014, the Vice-President of Directorate-General 1 published the final cluster area of competence plans for 2015, which foresaw inter alia the transfer of the area of competence G01R in Directorate-General 1 from Berlin to Munich as from 1 January 2015. Hence, the area of competence G01R, which was split between Munich and Berlin, would be on one site only.

Complaint No. 13

The complainant, who was a patent examiner in the area of competence G01R in Berlin, contests the decision to reassign her pursuant to the closure of that area of competence in Berlin.

Late October 2014, the complainant contested the 10 October 2014 plans in accordance with the implementation procedure. On 28 January 2015, she was informed that the Vice-President of Directorate-General 1 had endorsed the Implementation Support Committee's recommendation to maintain the 10 October 2014 plans, and that she would be transferred to a new technical field in 2015. On 28 April 2015, the complainant requested a review of that decision, which was rejected. She then filed an appeal with the Appeals Committee, on 25 September 2015, requesting in particular that the decision to close G01R in Berlin be quashed and that she be compensated.

In the meantime, on 11 March 2015, the complainant was informed that, in accordance with her wish, she would be reassigned as of 1 April 2015 to a different Directorate but remain in Berlin. On 17 April 2015, the Head of the Human Resources Department for Berlin and Vienna confirmed her reassignment. In June 2015, the complainant filed a request for review of the 11 March 2015 decision and, in July 2015, she filed a request for review of the 17 April 2015 decision. She asked that the decision to close G01R in Berlin be quashed *ex tunc*, that the final implementation plans for 2013 and 2014 insofar as the plans related to G01R be "reset", and that she be compensated for moral damages and for procedural delay. Her requests, which had been joined, were rejected on the grounds that a reassignment decision was discretionary, that no grounds liable to make the decision unlawful had been identified, and that her request concerning the decision to close G01R in Berlin had already been treated several times. The complainant filed an appeal against that decision on 23 October 2015.

In April 2016, the complainant was notified that her two appeals, the one filed on 25 September 2015 and the one filed on 23 October 2015, were consolidated under one reference. Having heard the complainant orally, the Appeals Committee issued its opinion on 15 February 2019.

In its view, the consolidated appeal was receivable insofar as it was directed against an individual decision having a direct effect on the complainant's rights and duties, that is to say the assignment to a different directorate and the move to a new technical field. It doubted that she could challenge the decision to close G01R *per se* as it was a general decision applied to a group of patent examiners with different possible consequences for each of them. However, it could examine its lawfulness in the frame of the appeal filed by the complainant against the individual implementing decision referred to above. The decision of 17 April 2015 confirmed the decision of 11 March 2015 but also defined the administrative consequences thereof; thus, it could validly be challenged. The Appeals Committee did not find a formal flaw nor a ground, which would lead to the conclusion that the President of the Office did not exercise his discretion lawfully or that the contested reassignment decision was unjustified. The Appeals Committee recommended rejecting the claim for moral damages for the length of the procedure on the ground that the duration of three years between the filing of the appeal and its deliberations was appropriate in light of the complexity of the case.

By a letter of 21 March 2019, the Vice-President of Directorate-General 4, acting on delegation of authority from the President of the Office, informed the complainant that she endorsed the Appeals Committee's recommendation. She stressed that the decision to close the area of competence in question was a managerial decision that was not open to challenge. That is the decision the complainant impugns in her thirteenth complaint.

Complaint No. 14

The complainant, who was a patent examiner in the area of competence G01R in Berlin, contests the decision to close that area of competence in Berlin.

On 31 October 2014, the complainant submitted a request for review asking inter alia that the decision of 10 October 2014 to close the area of competence G01R in Berlin be quashed. She argued inter alia that it constituted a hidden disciplinary action.

She was informed, in December 2014, that her request for review could not be considered on substance at that stage given that, in accordance with the implementation procedure, she had filed, in October 2014, an internal complaint with the Vice-President of Directorate-General 1 challenging the decision of 10 October 2014. The Vice-President had submitted her internal complaint to the Area of Competence Implementation Support Committee, which would examine it in due time and that she may file a request for review after the outcome of the Implementation Resolution Process. On 1 April 2015, the complainant filed an internal appeal with the Appeals Committee challenging the December 2014 decision and obtained a final decision which was withdrawn by the President of the Office and remitted to a newly composed Appeals Committee pursuant to Judgment 3785. The complainant objected, to no avail, to that way of doing so. The newly composed Appeals Committee indicated, in its opinion of 15 February 2019, that it applied the summary procedure to the 1 April 2015 appeal as it was manifestly irreceivable. Indeed, the appeal was directed against the cluster area of competence plans for 2015, communicated to staff on 10 October 2014. That communication was a decision of a general nature requiring a further individual implementing decision to have an effect on the complainant's legal situation. Since the appeal was not directed against a final decision adversely affecting her, it was premature. The Appeals Committee nevertheless recommended awarding her moral damages for the length of the internal appeal procedure.

By a letter of 15 April 2019, the Vice-President of Directorate-General 4, acting on delegation of authority from the President, informed the complainant that she endorsed the Appeals Committee's recommendation for the reasons it stated, except regarding the conclusion that the official communication of the cluster area of competence plans and the decision to close the area of competence

G01R were of a general nature. In her view, these decisions were of an organisational nature, and thus were not open to challenge. She awarded the complainant 300 euros in moral damages for the length of the procedure. That is the decision the complainant impugns in her fourteenth complaint.

In her thirteenth and fourteenth complaints, the complainant asks the Tribunal to quash the impugned decision, to declare the Appeals Committee's opinion null and void, to complement the fact-finding and "taking of evidence", and to give her the opportunity to comment on any new fact, evidence, or grounds submitted by the EPO in the reply. She also asks the Tribunal to declare the closure of the area of competence G01R in Berlin "illegitimate *ex tunc*", and to acknowledge the suspicion of partiality of the "involved officers". She further asks the Tribunal to "reset" the final implementation plan to the original final implementation plan by reinstalling the area of competence G01R in Berlin in the status defined in the original final implementation plan. Lastly, she seeks an award of moral damages including for undue delay in the examination of her appeal, costs, and compound interest on all amounts due.

In her thirteenth complaint, the complainant also asks the Tribunal to quash the decision to transfer her to a different area of competence.

As an auxiliary claim, she asks in both complaints that the Tribunal remits the case to the EPO for examination by a duly composed and balanced Appeals Committee, specifying, in her thirteenth complaint that the remittal is requested if the Tribunal finds that it is not expedient to "finally decide" the case. In both cases, she also makes the following auxiliary claims: compensation for procedural delay and violations, costs and compound interest at the rate of 6 per cent per annum on all amounts due. In her fourteenth complaint, she also asks the Tribunal to quash the impugned decision *ab initio*, and to declare the Appeals Committee's opinion null and void.

The EPO asks the Tribunal to dismiss the thirteenth and fourteenth complaints as irreceivable insofar as the complainant contests the decision to close the area of competence G01R, which was a managerial decision. The complaints are otherwise unfounded. Subsidiarily, the

EPO makes a counterclaim for costs on the ground that the fourteenth complaint amounts to an abuse of process, and asks that the complainant bears her costs regarding her fourteenth complaint.

CONSIDERATIONS

1. In her thirteenth complaint, the complainant requests the joinder of that complaint with her seventh complaint. In her fourteenth complaint, the complainant requests the joinder of her complaint with her seventh and thirteenth complaints. The request for joinder with her seventh complaint is moot, as the latter has already been decided by Judgment 4256, delivered in public on 10 February 2020. In Judgment 4256, the Tribunal dismissed her seventh complaint on the ground that the impugned decision had been lawfully withdrawn by the President of the Office and the appeal had then been lawfully remitted to a newly composed Appeals Committee for examination.

The complainant's thirteenth and fourteenth complaints are based on the same facts and address the same substantial issues. Thus, the Tribunal finds it expedient to join them, in order to render one judgment.

2. The complainant applies for oral hearings. She does not list witnesses on the complaint forms but, in her thirteenth complaint, she refers to colleagues that the Tribunal may wish to hear to confirm her position. The Tribunal observes that the parties have presented ample written submissions and documents to permit the Tribunal to reach an informed and just decision on the case. Thus, the request for oral hearings is rejected.

3. The following discussion proceeds against the background already set out in the facts described above. The complainant contests on the merits the decisions of 21 March 2019 and 15 April 2019, which are respectively impugned in her thirteenth and in her fourteenth complaint, alleging, in brief, that:

(a) the closure of the area of competence G01R in Berlin and her reassignment to a different area were tainted by abuse of authority and her reassignment was a hidden disciplinary sanction. She advances a suspicion of partiality, as the officers involved in the closure of the area of competence G01R and the adoption of the subsequent decision to reassign her had in the past unduly interfered with the responsibilities vested in the Examining Division to which she was assigned;

(b) the Appeals Committee wrongly overlooked essential facts and arguments she had submitted with regard to the suspicion of partiality; and

(c) the reasons given for the closure of the area of competence G01R and for her reassignment, i.e. to increase efficiency and eliminate tensions in the operations of the Department, are unfounded.

The Tribunal recalls its well-established case law that decisions regarding restructuring, reassignment of staff members to different posts, and changes in the duties assigned to staff members, involve the exercise of a wide discretionary power and are therefore subject to limited judicial review by the Tribunal (see Judgments 4084, consideration 13, 3488, consideration 3, and 2562, consideration 12). The Tribunal may interfere only on the limited grounds that the decision was taken *ultra vires* or shows a formal or procedural flaw or mistake of fact or law, if some material fact was overlooked, if there was misuse of authority, or an obviously wrong inference from the evidence. However, the organisation must show due regard, in both form and substance, for the dignity of the officials concerned, particularly by providing them with work of the same level as that which they performed in their previous post and matching their qualifications (see Judgments 4240, consideration 5, and 3488, consideration 3). The Tribunal observes that the complainant has not provided sufficient evidence to support her suspicions of partiality. She refers to former episodes of alleged interference in her work by officers in the Examining Division. The Tribunal recalls that the complainant's claims alleging undue interference in her work in the Examining Division have already been adjudicated by the Tribunal, in Judgment 4417. The Tribunal held that decisions with respect to the law

and/or procedures applicable to patent applications do not "adversely affect" staff members and, thus, cannot be the subject of an internal appeal (see Judgment 4417, considerations 7 and 8):

> "7. [...] In short, such decisions are not appealable and do not create a cause of action. The Tribunal also held [...] that proposals and/or decisions relating to the law and/or procedures applicable to patent applications do not directly affect the relationship of staff members with the Organisation, although [...] decisions or proposals as to the implementation of changes to the law and/or procedures may well do so.
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> 8. [...] [The contested decisions] did not adversely affect her working relationship with the EPO in the sense of Article 108 of the Service Regulations. Her internal appeals were accordingly manifestly irreceivable pursuant to Article 9(2)(b) of the Implementing Rules for Articles 106 to 113 of the Service Regulations."

The matter raised by the complainant is thus *res judicata* between the parties to this complaint, pursuant to Judgment 4417. The adoption of the abovementioned lawful decisions, on its own, cannot substantiate a suspicion of partiality, neither with regard to the restructuring decision to close an area of competence nor to the subsequent individual decision to reassign the complainant. Nor does the complainant offer the Tribunal further material to substantiate her suspicions. Since there is not sufficient evidence of the alleged suspicion of partiality, the Tribunal is satisfied that the impugned decisions and the related initial decisions were not tainted by abuse of authority. Furthermore, regarding the allegation of hidden disciplinary sanction, there is no evidence that the decisions at stake in the present complaints disregarded the complainant's dignity, or that she was not provided with work matching her qualifications and of the same level as that which she had performed in her previous post. Moreover, she was offered the option to move to Munich or remain in Berlin in a different office, and her wish to remain in Berlin was satisfied. She was not transferred from Berlin to Munich, and was reassigned to a different area of competence in Berlin. Thus, the allegation that her reassignment amounted to a hidden disciplinary sanction is unsubstantiated.

The complainant further contends that the closure of the area of competence G01R in Berlin did not increase efficiency as indicated by the EPO. However, the complainant does not establish procedural or

substantive errors of this decision, which is organizational in nature, and thus involved the exercise of a wide discretionary power. The Tribunal does not have the authority to decide which of the many possible restructuring options should be chosen by the Organisation.

In light of the foregoing, the complainant's pleas related to the merits of the impugned decisions are unfounded.

4. The complainant alleges procedural flaws in the process that led to the adoption of the 10 October 2014 decision to close the area of competence G01R in Berlin. She observes that the decision breached points 4 to 6 of Section "[area of competence] creation and implementation process" of the President of the Office's 9 November 2011 decision. Namely, she mentions the failure to hear the officials concerned (i.e. the "examiners directly affected") and to convene the Implementation Support Committee in a timely manner. Having examined the documents in the file, the Tribunal is satisfied that no such flaws exist, as the complainant was duly and properly informed of the closure decision before its definitive adoption, and was allowed to comment on it. Moreover, the Tribunal does not accept that the operation of the Implementation Support Committee was affected by substantive flaws that impeded a proper consultation with the examiners directly affected. In light of the foregoing, the complainant's pleas related to the procedural flaws in the decision to close the area of competence G01R are unfounded.

5. The complainant advances a number of pleas concerned with the proceedings before the Appeals Committee. She alleges that:

(a) the re-registration of her internal appeals, following the withdrawal of the decision on her former appeals, was unlawful;

(b) her oral hearing by video-conference rather than in person was unlawful;

(c) the Appeals Committee wrongfully treated her appeals by summary procedure; and

(d) the final decision contained reasons on which she did not have the opportunity to comment during the internal appeal proceedings (this plea is submitted only in her fourteenth complaint).

These pleas assume that any alleged failure in the internal appeal process is justiciable before the Tribunal as part of the review of the lawfulness of the administrative decisions under challenge. The Tribunal will, in this case, proceed on the basis that all such failures are justiciable but it is by no means certain that this is correct.

As to the plea related to the re-registration of her appeal, the Tribunal recalls that the complainant impugned the decision on her former internal appeal in a complaint that has been decided by Judgment 4256. Pursuant to Judgment 3785, delivered in public on 30 November 2016, in which the Tribunal found that the Appeals Committee was not composed according to the applicable rules, the President of the Office informed the complainant that he had decided to withdraw his final decision and to refer the appeals back to a newly composed Appeals Committee for a new examination. Accordingly, Judgment 4256, in consideration 8, stated "As a result of the withdrawal of the impugned decisions, the Tribunal can only conclude that the complaints are now without object. The legal foundation for the complainants' claims no longer exists, and their complaints must therefore be dismissed in their entirety." Judgment 4256 also examined the issue raised by the complainant in the present complaints regarding the lawfulness of the withdrawal of the 10 October 2014 decision and of the referral of the appeal back to the Appeals Committee. The Tribunal found that such decisions were lawful (see Judgment 4256, considerations 6 and 7).

As the complainant was one of the complainants in Judgment 4256 rendered against the EPO on the same issue as the one presently raised by the complainant in her fourteenth complaint, Judgment 4256 has *res judicata* authority. Accordingly, since the withdrawal decision was lawful, the Appeals Committee correctly re-registered the complainant's internal appeal.

As to the alleged procedural flaws, which occurred in the internal appeal proceedings, the Tribunal is satisfied that in the present case, having regard to the nature of the pleas, the hearing by video-conference

and the dismissal of the appeal by summary procedure did not infringe the complainant's right of defence. Thus, these pleas are unfounded.

As to the lack of opportunity to comment on the final decision prior to its adoption – an issue raised only in the complainant's fourteenth complaint – the Tribunal notes that the relevant Service Regulations do not provide that the final decision be submitted to the staff member for comment before it was taken (see Article 110(4) of the Service Regulations for permanent employees of the European Patent Office).

6. The complainant alleges that the composition of the Appeals Committee was flawed. She submits that general decisions CA/D 2/14 adopted in 2014, CA/D 18/16 adopted in 2016, and CA/D 7/17 adopted in 2017, unlawfully provided that:

(a) the Chair and two Vice-Chairs of the Appeals Committee were appointed by the President without consulting the staff representatives and the General Consultative Committee (GCC); and

(b) the members of the Appeals Committee appointed by the Central Staff Committee (CSC) could previously be selected from among all staff members and not just from elected Staff Committee members; being a member of a Staff Committee and a member of the Appeals Committee at the same time might lead to a conflict of interest.

She adds that the process that led to the adoption of the decisions CA/D 18/16 and CA/D 7/17 was flawed.

One of the issues submitted by the complainant, namely the one addressing the appointment of members of the Appeals Committee by the CSC, has been dealt with by the Tribunal in Judgment 4550. The Tribunal annulled the relevant Staff Rule to the extent it obliged the CSC to choose the members of the Appeals Committee among its members, rather than among all staff members (see Judgment 4550, considerations 1, 7 and 15).

The Tribunal notes that, even though in the present case the composition of the Appeals Committee were to be considered unlawful, consistent with the outcome of Judgment 4550, such finding would not

affect the outcome of this judgment, for the following reasons. Firstly, the complainant does not ask that the case be referred back to the EPO if the Tribunal decides the case on the merits, which it does (in particular, in her rejoinder contained in her thirteenth complaint, she points out that she "has a pressing cause of action to get a legally binding judicial decision [...] She thus respectfully asks the Tribunal to finally decide on the case for reasons of legal certainty and peace"). In any case, the Tribunal's case law holds that when complaints are judged by the Tribunal as devoid of merit – as in the present case – no useful purpose would be served by sending the case back to the Organisation (see Judgment 3890, consideration 4). Secondly, since the complaints are being judged by the Tribunal as devoid of merit, no different result for the complainant could be obtained by renewing the consultation process before the Appeals Committee (see Judgment 3890, consideration 6).

Moreover, the complainant does not specifically request moral damages stemming from the alleged unlawful composition of the Appeals Committee, and thus there is no need to assess the unlawful composition to this extent. In addition, the Tribunal notes that, by letter of 12 January 2023, the EPO informed the Tribunal that it had paid 100 euros moral damages to several complainants, including the present complainant, following Judgment 4550; therefore, the complainant has already been awarded a compensation for the unlawful composition of the Appeals Committee. In such a situation, there is no need to address the merits of the pleas concerning the composition of the Appeals Committee.

7. Since the complainant's pleas are unfounded, her claims to annul the impugned decisions and the related initial decisions should be dismissed, as well as her claim for moral damages stemming from such decisions.

8. With regard to the complainant's claim for moral damages related to the undue delay in the examination of her internal appeals, the Tribunal recalls that the amount of compensation for unreasonable delay will ordinarily be influenced by at least two considerations: the length of the delay and the effect of the delay. Recent case law holds

that an unreasonable delay in an internal appeal is not sufficient to award moral damages. It is also required that the complainant articulate the adverse effects which the delay has caused (see Judgment 4563, consideration 14). The Tribunal also notes that the EPO, by the 15 April 2019 decision, impugned in the complainant's fourteenth complaint, has already awarded her 300 euros in moral damages for the length of the procedure. The complainant does not provide the Tribunal with evidence of any adverse effects of the delay warranting additional redress.

9. Considering that all the main claims are unfounded, the complainant is not entitled to costs for the present proceedings.

10. In order to assess whether the complainant is entitled to costs for the internal proceedings, it must be recalled that Judgment 4256 found the complainant's former complaint to be moot following the withdrawal of the underlying decision, but added, in consideration 9, that the complainant might be entitled to costs in the resumed internal proceedings: "[i]t is however noted that the complainants may have incurred costs in filing complaints against a decision which was presented to them as a final decision that could be impugned before the Tribunal. As the withdrawal of the impugned decisions was not caused by the complainants but by the way in which the EPO interpreted its rules, the complainants may be entitled to costs [...] Such costs should be considered in the resumed internal appeal proceedings." However, the complainant has not specified in the present complaints that she is also requesting costs for the internal proceedings. Since such costs can be awarded only under exceptional circumstances, the Tribunal will not award them in the absence of a specific request and the lack of any evidence justifying their amount.

11. Since the complaints will be dismissed on the merits, there is no need to address the receivability issues raised by the Organisation.

12. The counterclaim for costs filed by the Organisation regarding the fourteenth complaint is rejected. The Tribunal will avail itself of the possibility to condemn a complainant to costs only in exceptional situations. Indeed, it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and

chilling effect of possible adverse awards of that kind. In the instant case, the complaints cannot be regarded as manifestly vexatious (see Judgment 4143, consideration 7).

DECISION

For the above reasons,

1. The complaints are dismissed.

2. The counterclaim for costs is also dismissed.

In witness of this judgment, adopted on 19 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

MIRKA DREGER