

E. (No. 2)

v.

EPO

138th Session

Judgment No. 4892

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms B. E. against the European Patent Organisation (EPO) on 13 February 2015 and corrected on 6 March, the EPO's reply of 22 June 2015, the complainant's rejoinder of 4 August 2015, corrected on 24 August, and the EPO's surrejoinder of 17 November 2015;

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 staff report for 2008-2009 and the decision not to initiate a harassment procedure against her reporting officer.

At material times, the regulatory framework within the EPO for creating and reviewing staff reports was embodied in Circular No. 246, entitled "General Guidelines on Reporting". If a staff member was not in agreement with the content of her or his report, Section D facilitated a conciliation procedure between her or him and her or his reporting and countersigning officers, under the direction of a mediator appointed by the President of the European Patent Office, the EPO's secretariat. If no agreement was reached at the end of the mediation procedure,

Section D(7) permitted the staff member to pursue the matter before the Internal Appeals Committee in accordance with Articles 107 and 108 of the Service Regulations for permanent employees of the Office.

The complainant joined the Office in 1987 as an examiner. With effect from 1 September 2007, she was promoted to grade A4(2).

On 25 March 2010, her reporting officer signed her staff report for the period 1 January 2008 to 31 December 2009. Her quality, productivity, aptitude and attitude to work and dealings with others were rated as “good”, and so was the overall rating. The countersigning officer agreed with the markings and signed the report on 6 April. The complainant signed it on 12 May, noting her disagreement, adding dissenting comments and requesting to apply the conciliation procedure set out in Section D of Circular No. 246. More specifically, she contended that her reporting officer was not in a position to appraise her, that the “downgrading” in all box markings, particularly in aptitude, as compared to previous reports, was completely unexpected and that some comments were meaningless, incomprehensible and unjustified.

On 31 January 2011, after reviewing the complainant’s comments, the reporting officer added his final comments and maintained the markings he had previously given. The countersigning officer made no further comments and signed again the report on 3 February 2011. On 25 February 2011, the complainant completed the staff report and reiterated her request that the matter be treated in accordance with Section D of Circular No. 246.

A conciliation meeting took place on 24 April 2012, during which the parties were unable to resolve their disagreement. The mediator drew up a report on 18 June 2012 and sent it to the complainant, the reporting officer and the Vice-President of Directorate-General 1 (DG1).

On 20 June 2012, the complainant made a request to the President of the Office for formal investigation of harassment allegedly committed by her reporting officer. She contended that, during the conciliation procedure, the latter “repeatedly confirmed to having collected, in [her] absence and without [her] knowledge, feedback about

[her] working performance from third persons, including formalities officers, examiners and directors, and claimed that the obtained information reflected negatively on [her] conduct at work". She asserted that the reporting officer's reference to negative feedback by others was a false assertion damaging her professional reputation and, hence, was defamatory. She attached the mediator's report as evidence. Subsequently, on 11 July 2012, she requested the Human Resources Line Management Support to initiate harassment proceedings in accordance with Circular No. 286 on the "Protection of the dignity of staff".

On 22 August 2012, she was informed by the Vice-President of Directorate-General 4 (DG4) that the procedure under Circular No. 286 had been formally suspended and that, until the introduction of a new procedure, harassment-related grievances were submitted to the President who would refer the matter to an external ombudsman "on a case-by-case basis". She was then advised that "it ha[d] been decided not to assign [her] case to an Ombudsman".

On 23 August, the complainant reiterated her request that a formal investigation be opened against her reporting officer. Her request was rejected on 26 October 2012 on the basis that she had not put forth *prima facie* evidence giving rise to a suspicion of harassment and, therefore, the investigation procedure was not considered necessary.

The final staff report was endorsed without amendment by the Vice-President of DG1 on 11 February 2013. The complainant signed it on 20 February and, on the same day, initiated proceedings before the Internal Appeals Committee arguing that her staff report had been drawn up in violation of Circular No. 246 and was based on mistakes of facts, such that she was entitled to a new staff report or, alternatively, an award of moral damages.

On 12 November 2014, the Internal Appeals Committee issued two separate opinions on each of the decisions contested by the complainant. Concerning the decision not to pursue the allegations of harassment she had made against her reporting officer, the majority of the Internal Appeals Committee found that she had not offered sufficient evidence to establish a *prima facie* suspicion of harassment

and recommended rejecting the appeal as unfounded. Concerning the decision to confirm the staff report, the Internal Appeals Committee's majority concluded that the complainant had not shown that the contested box markings or the comments contained in the report were legally flawed and, hence, recommended dismissing the appeal as unfounded in its entirety.

By a single letter dated 19 January 2015, the complainant was informed that the Vice-President of DG4, acting by delegation of power from the President, had decided to follow the Internal Appeals Committee's majority recommendations to reject her two appeals. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the issuance of a flawless staff report for 2008-2009. She also seeks the award of moral damages, in an amount of 35,000 euros, as well as costs.

The EPO requests the Tribunal to dismiss the complaint as unfounded in its entirety and order that the complainant bear all costs she has incurred in bringing these proceedings.

In her rejoinder, the complainant requests that the EPO's claim to impose the costs on her be dismissed as it constitutes an attempt to deny her a fair procedure and discourage a justified complaint.

CONSIDERATIONS

1. The complainant was, at material times, a member of the staff of the EPO, retiring on 1 August 2018. Much of the relevant background is set out earlier in this judgment. The impugned decision of the Vice-President of Directorate-General 4 (DG4), acting by delegation of power from the President of the Office, of 19 January 2015 addressed two topics, each of which had been the subject of a separate opinion of the Internal Appeals Committee. Both opinions were dated 12 November 2014. One concerned a contested staff report of the complainant for 2008-2009. The other concerned a decision of the President not to pursue allegations of harassment made by the

complainant against Mr T.E., who had been the director of the complainant's Directorate at relevant times and, at least in fact, the reporting officer for the contentious staff report.

2. The Tribunal will consider each matter separately, though there is overlap given that Mr T.E. was the reporting officer. The Tribunal first considers the complainant's challenge to the contested staff report. Under the heading "[r]easons for the [c]omplaint" in the complainant's pleas in her brief, there are three subheadings directly challenging the report. The first is that "[Mr] T.E. is not entitled to appraise me", the second is that "[t]he contested [staff report] is unjustified" and the third is that "[s]landerous/libellous comments have been disseminated about me". Thereafter was a fourth subheading "Internal Appeals Committee's [o]pinion" which addresses both the opinion of the Committee concerning the appeal relating to the non-pursuit of her harassment claim and the opinion of the Committee addressing her challenge to the staff report.

3. The issue arising under the first subheading involves a contention by the complainant that Mr T.E. was not her immediate supervisor and thus was not "the immediate superior of the person reported upon" for the purposes of Circular No. 246 which concerns the preparation, adoption and review of staff reports. Foundational to this argument was the grade she held, A4(2), and Mr T.E.'s grade, A5, together with a statement contained in Article 3 of the Administrative Council's decision CA/D 8/02 (amending, among other things, the salary scales to permit a restructuring of the career system for staff in category A) that "[g]rades A5 and A4(2) are both regarded as immediately above grade A4 for the purposes of the [Service] Regulations [for permanent employees of the Office]".

4. The difficulty with the pleas of the complainant on this topic is that they are mainly reactive, that is to say involving rebuttal of arguments of the Organisation. The Organisation refers to opinions of the Internal Appeals Committee, including in the present case, in which it accepted that, in substance, an official at a grade A5 was not on the

same level as an official at a grade A4(2) and the former could be a reporting officer for the latter. Simply advancing arguments that the analysis of the Organisation is wrong, does not necessarily demonstrate that the arguments of the complainant are correct. She has not established that Mr T.E. did not have authority to act as the reporting officer and does not provide the legal basis for asserting this is so. The Tribunal notes that the Organisation contends in its reply that the complainant agreed in writing at the time to the assignment of her reporting officer (Mr T.E.), a factual contention not contested by the complainant in her rejoinder though she contends it is irrelevant. Quite plainly the complainant now challenges Mr T.E.'s authority because she was dissatisfied with his assessment. This fact is relevant insofar as it bears upon the veracity of the complainant's contentions concerning Mr T.E.'s appointment and activities.

5. The second subheading referred to earlier is that "[t]he contested [staff report] is unjustified". This is tantamount to an invitation to the Tribunal to enter the issue of whether a particular assessment in a performance appraisal report is appropriate. However, it has long been acknowledged that a request such as this would involve an impermissible determination by the Tribunal of what the appraisal should be (see, recently, Judgment 4786, consideration 1). The Tribunal noted in Judgment 4786 that it can, if the report was the product of one of the legal flaws listed in Judgment 4564, consideration 3, set aside the contested staff report at the same time as the impugned decision and remit the matter to the Organisation for review. But that is done only if a legal flaw is demonstrated. It is not in the present case.

6. The third subheading referred to earlier is that "[s]landerous/libellous comments have been disseminated about me". This is a contention concerning the conduct of Mr T.E. The only relevance of this plea in relation to the staff report would be if the complainant was able to establish that Mr T.E. had been actuated by bias or ill will towards her which infected his assessment of her performance. In the main, the evidence relied upon by the complainant concerns matters of detail including comments to which she takes exception or comments

that she views as contradictory, but nonetheless views as proof of bias or ill will. None of the evidence, either in isolation or in aggregate, demonstrates bias or ill will on the part of Mr T.E. in the preparation of the report, which was also the considered conclusion of the Internal Appeals Committee's majority. While the Tribunal acknowledges the difficulty in proving bias or ill will (see, for example, Judgments 2318, consideration 4, and 2259, consideration 13), nonetheless the burden of doing so falls on the complainant (see Judgments 4745, consideration 12, and 4010, consideration 9). In these proceedings, she has failed to do so.

7. The fourth subheading referred to earlier was the "Internal Appeals Committee's [o]pinion". In this section of her pleas, the complainant critiques the Committee's two opinions, relevantly at this point, the one concerning the staff report. But this latter critique is only relevant to the extent that it exposes flaws in the Committee's analysis upon which the Tribunal is relying. There are no flaws of this character.

8. The Tribunal now considers the decision not to pursue the charges of harassment made by the complainant. The complainant wrote to the President on 20 June 2012 requesting the Organisation to initiate an investigation of harassment against Mr T.E. By letter dated 22 August 2012 from the Vice-President of DG4, the complainant was informed that "it ha[d] been decided not to assign the case to an Ombudsman". This led, internally, to the appeal resulting in the opinion of the Internal Appeals Committee. After reviewing the complainant's pleas and evidence, the Committee's majority concluded there was no *prima facie* evidence of harassment and the decision of the Organisation not to investigate the harassment grievance was thus lawful. A recommendation was made by the majority that the appeal be rejected as unfounded, which it was.

9. Much of the complainant's case in her brief impugning the decision initially not to assign the case to an Ombudsman and, subsequently, to dismiss her appeal against that decision, is to be found in her critique of the opinion of the Internal Appeals Committee on this

topic. That critique is, in turn, a comparatively unstructured mixture of references to judgments of this Tribunal, mostly generalised assertions of fact and criticism of conclusions of the Committee. One of the few specific events mentioned in the pleas, and actually said to be harassment, was the inquiries made by Mr T.E., as the reporting officer, of third parties about the complainant's work. That this occurred was unexceptionable though the complainant fails to accept this is so, focusing on the effect on her of this having happened, saying "due to my seniority [this was] humiliating". Indeed, the performance evaluation form contemplates feedback on the staff member's dealings with others which almost necessarily would involve consultation with and feedback from colleagues. She goes on to say, incorrectly, that "[t]his would support [...] a *prima facie* suspicion of harassment".

10. The complainant has not established any legal error in the decision to not assign her case of harassment to the Ombudsman.

11. The complainant has failed to demonstrate that the impugned decision of 19 January 2015 is in any respect unlawful. Accordingly, this complaint should be dismissed. No order for costs should be made.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 23 April 2024, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

MIRKA DREGER