

118th Session

Judgment No. 3337

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P.D.M. against the European Patent Organisation (EPO) on 16 June 2010 and corrected on 6 September, the EPO's reply of 20 December 2010, the complainant's rejoinder of 7 April 2011 and the EPO's surrejoinder of 1 August 2011;

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 and the pleadings may be summed up as follows:

A. The complainant joined the EPO in November 1998 as an examiner at grade A2 in Directorate General 1 (DG1). He was promoted to grade A3 on 1 July 2001. On 17 March 2003 he was transferred on loan to the post of Head of Recruitment in Principal Directorate Personnel (PD 4.3) of Directorate General 4 (DG4). This transfer, which was initially until 31 December 2003, was extended to 31 March 2005. With effect from 1 April 2005 he was transferred

to Principal Directorate European and International Affairs (PD 5.1) in Directorate General 5 (DG5). Following several proposals and discussions regarding his assignment, he was finally transferred with effect from 1 April 2006 to a permanent post in PD 5.1.

In September 2005 the complainant initiated a formal complaint of harassment, under Circular No. 286 on the Protection of the dignity of staff, against Mr L., his former supervisor and Principal Director of Personnel (first harassment complaint). He alleged that Mr L. had deliberately intimidated and harassed him over a period of two years, had delayed the recalculation of his reckonable experience, had manipulated his staff reports, had removed him from the post of Head of Recruitment in PD 4.3 and had demoted him to “a mere Human Resources Manager” in that Directorate, had violated the EPO’s Service Regulations for Permanent Employees and its Financial Regulations and was also undermining his position in PD 5.1. In his report of 1 June 2006, the Ombudsman found that the complainant had been subjected to recurring inappropriate behaviour by Mr L., whose mishandling of numerous conflicts had undermined the complainant’s dignity. He recommended that the Administration take swift and appropriate measures to settle the issues regarding the calculation of the complainant’s reckonable experience, his staff reports and posts, that it take disciplinary measures against Mr L. based on the complainant’s allegations and that it ensure that there would be no future contact between the complainant and Mr L. By a letter of 15 September 2006, the President of the EPO warned Mr L. that if he was informed of other repeated inadequate practices in the future, he would feel obliged to consider the possibility of imposing upon him disciplinary sanctions. Referring to the Ombudsman’s conclusions regarding his management behaviour, he invited him to submit his comments in writing within a fortnight.

By another letter of the same day, the President notified the complainant of his final decision on his harassment complaint against Mr L. He stated that he accepted the Ombudsman’s conclusions and that he had decided to take appropriate measures. With regard to his reckonable experience, staff reports and posts, the President indicated

that he did not want to interfere in the internal appeals on these issues, which were pending, but that he had asked the respective services to treat them as a matter of priority. He considered that it would be unrealistic to preclude any future contact between the complainant and Mr L., given the latter's function, but that their interactions would be kept to a strict minimum. He invited the complainant to make use of the psychological counselling services available to staff.

On 12 July 2007 the complainant wrote to the President – a new President had taken office on 1 July 2007 – seeking information on the state of implementation of the Ombudsman's recommendations. In her reply of 25 July 2007, the new President informed the complainant that her predecessor had already taken appropriate measures to implement his decision and that the Administration was under no obligation to reveal what measures these were. With regard to his pending appeals, she indicated that such proceedings required a certain amount of time and that, although the respective services were doing their best to deal with his appeals, there was a large number of earlier appeals. On 24 October 2007 the complainant again wrote to the President requesting immediate implementation of the Ombudsman's recommendations. In the event that she decided not to grant his request, he asked that his letter be treated as an internal appeal against the EPO's failure to implement the Ombudsman's recommendations. This appeal was referred to the Internal Appeals Committee (IAC) and registered under reference number RI/170/07. It was still pending when the present complaint was filed with the Tribunal.

On 4 June 2008 the complainant made allegations of harassment against Mr G. and Mr P., his Principal Director and Head of Department respectively, and on 17 June 2008 he requested that the President initiate a procedure under Circular No. 286 against them (second harassment complaint). After an initial refusal, the President agreed to refer these allegations to the Ombudsman. Following the Ombudsman's failure to adhere to the deadlines prescribed in Circular No. 286 and an action by him which the complainant perceived as a breach of confidentiality – the Ombudsman forwarded the

complainant's e-mail containing the names of proposed witnesses to a third party – the complainant filed an internal appeal on 17 June 2009. In that appeal he raised several matters, including matters arising from his first harassment complaint. Referring to the Ombudsman's procedure on his second harassment complaint, he argued that the latter's failings had caused further delay in solving his problems with the Office and had also raised concerns as to how seriously his grievances were being dealt with. Amongst other relief, he requested the implementation of the Ombudsman's recommendations on his first harassment complaint, an "intervention in the harassment situation he was subjected to", disciplinary measures against Mr G. and Mr P. and assurances that neither of them would be in a position to influence his future career. He also requested damages and costs. This appeal was referred to the IAC and registered under reference number RI/104/09. The latter concluded in its opinion of 3 February 2010 that the investigation into the complainant's allegations of harassment against Mr G. and Mr P. and the Ombudsman's attempts to mediate were not carried out within a reasonable time frame. It unanimously recommended that the complainant be awarded 1,000 euros in moral damages for the delay in implementing the Ombudsman's procedure in respect of his second harassment complaint and one fifth of his reasonable costs on production of documentary evidence. It otherwise recommended that the appeal be dismissed as irreceivable in part and unfounded in its entirety. By letter of 26 March 2010, which is the impugned decision, the complainant was informed of the President's decision to follow the IAC's recommendation.

Prior to that, on 14 September 2009, the complainant wrote to the President claiming that the Ombudsman, to whom his harassment complaint against Mr G. and Mr P. had been referred, had failed to conduct the formal procedure in line with Circular No. 286 and requesting that he be instructed to submit his report thereon by 1 November 2009. He asked that his letter be treated as an internal appeal in the event that the President could not grant his request. This appeal was likewise referred to the IAC, which registered it under RI/145/09. The Ombudsman issued his report on the

complainant's second harassment complaint on 30 October 2009, stating that he had been unable to establish any direct signs of harassment on the part of Mr G. and Mr P. He considered that the complainant had failed to distance himself from the events which had led to his first harassment complaint and that this had caused him to view with suspicion all subsequent events. By a letter of 20 November 2009, the President notified the complainant of her decision, based on the Ombudsman's analysis, to reject his harassment complaint against Mr G. and Mr P. On 19 February 2010 the complainant filed an internal appeal against this decision on the ground that it was based on "questionable findings". This appeal was referred to the IAC and registered under reference number RI/35/10. Internal appeals RI/145/09 and RI/35/10 were still pending when the present complaint was filed with the Tribunal.

B. The complainant argues that the complaint is receivable. Relying on the Tribunal's case law, he contends that the internal remedies must be deemed exhausted within the meaning of Article VII of the Tribunal's Statute because, although he pursued his claims with due diligence, he was unable to obtain a final decision within a reasonable period of time and the internal appeal proceedings were unlikely to end within a reasonable time. He explains that he has lost all confidence in the EPO's internal procedure for dealing with harassment complaints, not only because, as a result of the EPO's delay in dealing with his complaint, one of his harassers, Mr G., has in the meantime retired and will thus never face the consequences of his actions, but also because the Ombudsman dealing with his second harassment complaint was untrustworthy and biased and he delayed the submission of his report. He adds that Circular No. 286, the only internal mechanism for the protection of staff subjected to harassment, was repealed in June 2007, thus leaving the process opaque and aggrieved staff without guarantees of due process.

On the merits, he contends that the EPO failed to put an end to the harassment to which he was subjected for almost seven years starting

in 2003, and which consisted in vexatious changes of duties, the downgrading of his post as Head of Recruitment in PD 4.3, false accusations and intimidation in that Directorate and orders that he act contrary to the EPO's Service Regulations and Financial Regulations. He also refers to his transfer from PD 4.3 to PD 5.1 and the attempts to arbitrarily remove him from his post in PD 5.1, and he claims that he was the victim of a systematic exclusion and retention of information. He maintains that he suffered attacks to his dignity in PD 5.1, inter alia through an unmanageable workload. He reproaches the EPO for breaching its duty of care towards him by failing to implement the Ombudsman's recommendations of June 2006 regarding his harassment complaint against Mr L. and also by failing to carry out proper conciliation procedures in response to his harassment complaints in PD 4.3 and PD 5.1. He strongly criticises the President's inaction in that respect which, he argues, forced him to lodge several internal appeals. He alleges a breach of procedural fairness in the Ombudsman's procedure in response to his harassment complaint against Mr G. and Mr P. as well as in the internal appeal proceedings. In his opinion, the EPO has failed to address the irremediable loss of career advancement opportunities which he suffered due to the undue delay in the calculation of his reckonable experience, the manipulation of his staff reports in both PD 4.3 and PD 5.1, the interference of Mr L. in his career advancement, the EPO's refusal to offer him vocational training and the health problems he suffered as a result of his harassment.

The complainant asks that the EPO be ordered to intervene in a swift and concrete manner in the harassment situation he is subjected to and to provide assurances that Mr P. will not be in a position to influence his future career. He also asks that the EPO be instructed to submit his staff reports for the period from 1 April 2006 to 30 June 2009. He claims 60,000 euros in moral damages, 30,000 euros in material damages, 60,000 euros in exemplary damages, and costs. He claims interest at the rate of 8 per cent per annum on all amounts awarded and he requests that "the capital of interest [...] be monthly indexed based on the basis rate of the European Central Bank in order to maintain the real monetary value of the claim".

C. In its reply the EPO contends that the complaint is irreceivable to the extent that some of the issues raised by the complainant in his brief are the subject matter of internal appeals which are either still pending before the IAC, or which have been completed without being challenged in time and must therefore be deemed closed. It adds that the complainant also refers to decisions taken after the appeal underlying the present complaint was lodged, and that the issues raised in that connection are likewise irreceivable for failure to exhaust internal remedies. It also considers that the complainant's claims for a "swift and concrete intervention" in the harassment situation to which he is subjected, for assurances that Mr P. will not be in a position to influence his future career and for the submission by the EPO of his staff reports for the period from 1 April 2006 to 30 June 2009 are irreceivable, the first two for want of a cause of action – the complainant no longer works with Mr G. or Mr P. – and the third for failure to exhaust internal remedies. As to the claim regarding the indexation of "the capital of interest", it observes that it is unclear and that there is no starting date indicated for the calculation of interest.

On the merits, the EPO argues that the complaint is unfounded. With regard to the complainant's alleged harassment in PD 5.1, it notes that the issue is premature, as internal appeals RI/145/09 and RI/35/10 are still pending. On a subsidiary basis, it notes that the circumstances in which the alleged harassment took place no longer exist. Indeed, Mr G. has retired and there is no real risk that Mr P. will ever interfere with the complainant's career – he is no longer the head of the complainant's department. What is more, the complainant has been released from normal duties to assume his functions as a staff representative. As to the complainant's allegation of lack of due process guarantees in dealing with harassment complaints, it observes that since the suspension of Circular No. 286, such complaints are governed by an ad hoc procedure based on general principles of law, which fully meets all due process requirements.

The EPO denies any breach of its duty of care towards the complainant. It points out in this regard that the Ombudsman's

recommendations on the complainant's harassment complaint against Mr L. are the subject of pending appeal RI/170/07, that the complainant was able to contest by means of internal appeals what he considered to be unfavourable decisions and that there was no unreasonable delay in implementing the Ombudsman's procedure on his second harassment complaint. It adds that, under the Tribunal's case law, the complainant cannot request the imposition of disciplinary measures on another staff member and that, in any event, he has already been awarded damages for the delay in the Ombudsman's procedure on his second harassment complaint as well as costs. It thus invites the Tribunal to dismiss the claims for moral, material and punitive damages and costs as unfounded.

D. In his rejoinder the complainant presses his pleas. He argues that, rather than taking swift and concrete action against his harassers, the EPO chose to "tolerate" the fact that his internal appeals were pending for many years, thereby violating its duty of care towards him as well as his right to a fair procedure. He explains that the issue of his staff report for the period from 1 April 2005 to 31 March 2006 remains unresolved. As further evidence of the EPO's failure to afford him a fair procedure, he refers to the EPO counsel's insistence on having the hearing before the IAC for internal appeals RI/145/09 and RI/35/10 conducted in French, despite his prior formal request that the proceeding be conducted in English or German and his counsel's insufficient knowledge of the French language. He specifies that he claims interest on all awards of damages from the date of delivery of the Tribunal's judgment until the end of the month in which the EPO executes all orders made by the Tribunal.

E. In its surrejoinder the EPO maintains its position in full. It observes that IAC proceedings may be conducted in any EPO official language. As French is one of the EPO's official languages and in fact the complainant's preferred language – the complainant is a Belgian national – it is hard to see how the EPO counsel's preference for French amounted to a failure to afford the complainant a fair hearing.

CONSIDERATIONS

1. This matter is one of a number of appeals which the complainant has instituted concerning the Ombudsman's procedures initiated by the complainant against some of his superior officers alleging harassment and inappropriate behaviour by them. The present matter commenced as a claim he lodged by way of an internal appeal filed on 17 June 2009, which the President of the Office deemed to be inadmissible on the ground that it related to matters which were already the subject of pending appeal proceedings and a pending investigation by the Ombudsman. The President then referred the claim to the IAC, which registered it as internal appeal RI/104/09, on 12 August 2009.

2. In the impugned decision, which is contained in the letter of 26 March 2010, the President accepted the unanimous recommendations of the IAC dated 3 February 2010. The IAC had recommended an award to the complainant of 1,000 euros in moral damages for delay in implementing the Ombudsman's procedure that arose out of the complainant's second harassment complaint against Mr G. and Mr P., his Principal Director and Head of Department, respectively, in PD 5.1 where he worked at the material times. The IAC had also recommended that the EPO should have met 20 per cent of the complainant's costs. However, the IAC otherwise recommended the dismissal of the appeal as irreceivable or unfounded.

3. In his complaint, the complainant asks the Tribunal for the following relief:

- (a) To order swift and concrete intervention in the harassment situation that he is subjected to.
- (b) To instruct the President to ensure that Mr P. will not be in a position to influence the complainant's future career or to intervene in it.
- (c) To instruct the EPO to submit his staff reports for the period from 1 April 2006 to 30 June 2009.

- (d) To order the EPO to pay him a minimum of 60,000 euros in moral damages, and 8 per cent per annum interest thereon, for failing in its duty of care to remedy the harassment situation and letting it escalate notwithstanding his complaints about it.
- (e) To order the EPO to pay him 30,000 euros in material damages for the irreversible loss of his career advancement opportunities.
- (f) To order the EPO to pay him a minimum of 60,000 euros in exemplary damages for allowing further violation of his dignity for a period of over seven years and for undue delays in the settlement of conflicts generated by his stigmatisation in the EPO.
- (g) To order the EPO to pay costs.
- (h) To order the EPO to pay him 8 per cent per annum interest on the damages and costs awarded where the EPO's wrongful misdemeanours persist. The capital of interest to be monthly indexed based on the basic rate of the European Central Bank in order to maintain the real monetary value of the claim.

4. The EPO states that while the complaint is receivable *ratione temporis*, claims (a), (b), (c) and (h) are irreceivable for other reasons.

5. Claim (a) is unclear as stated. The complainant's second harassment complaint, which underlies his present complaint, identified Mr G. and Mr P. as the persons who were involved in the alleged harassment or inappropriate behaviour towards him. Claim (a) is redundant to the extent that it is intended to seek swift and concrete intervention in the harassment situation that he was allegedly subjected to by those two superior officers. This is because Mr P. retired on 1 March 2009, before the complainant's internal appeal relating to his second harassment complaint was lodged by letter of 17 June 2009. The Tribunal cannot now intervene in the situation in relation to Mr P. Neither can the Tribunal now intervene in the situation in relation to Mr G. He is no longer in a superior or supervisory position over the complainant as the complainant was released from his normal duties to work full time as a staff

representative. Mr G. does not now work in PD 5.1. In the circumstances, claim (a) has been partially overtaken by other events.

6. However, the Tribunal also notes that in the complainant's internal appeal, which underlies this complaint, he exhorted the President of the Office to implement the recommendations of the Ombudsman's report of 2006, which emerged from his first harassment complaint. He also requested the President's expeditious intervention to halt further harassment towards him. This obviously mirrors the "swift and concrete intervention in the harassment situation" which is what the complainant seeks in claim (a). This aspect of that claim, which invites the Tribunal to determine whether the EPO breached its duty of care towards him by failing to take prompt measures to protect him from harassment, is receivable.

7. Claim (b) is irreceivable as it does not reasonably provide a cause of action. It would be exceptional for the Tribunal to instruct the President to ensure that Mr P. will not be in a position to influence the complainant's future career or to intervene in it, as the complainant requests. This is because this claim points to a future possibility rather than to a current grievance and present injury. As the Tribunal observed in Judgment 1712, under 10, "[t]he necessary, yet sufficient, condition of a cause of action is a reasonable presumption that the decision will bring injury. The decision must have some present effect on the complainant's position." A reasonable presumption to this effect does not arise in the present complaint, given that the complainant has worked full time as a staff representative, and Mr P., who is now working with a different directorate, has no work contact with the complainant.

8. Claim (c) is plainly irreceivable for failure to exhaust the internal means of redress. It was in no instance a claim in any of the internal procedures underlying the present complaint.

9. Claim (h) is a claim for interest and will be dealt with accordingly.

10. The merits of claim (a), to the extent that it seeks damages for the breach of duty to expedite the harassment proceedings relating to the complainant's employment in PD 5.1, is therefore now considered.

11. The Tribunal has consistently stressed the serious nature of allegations of harassment in the workplace and the need for international organisations to investigate such allegations promptly and thoroughly. This is a function of the organisation's duty of care to its staff members to uphold their dignity. In Judgment 3071, under 36, for example, the Tribunal stated as follows:

“It is well established that an international organisation has a duty to its staff members to investigate claims of harassment. That duty extends to both the staff member alleging harassment and the person against whom a complaint is made (see Judgment 2642, under 8). [...] Further, the duty is a duty to investigate claims of harassment ‘promptly and thoroughly’ (see Judgment 2642, under 8).”

12. It is in relation to this obligation that the Tribunal, in Judgment 3069, under 12, for example, stated that international organisations have to ensure that an internal body that is charged with investigating and reporting on claims of harassment is properly functioning.

13. In keeping with these requirements, the EPO introduced Circular No. 286 of 27 May 2005. The Circular was under the rubric “Protection of the dignity of staff”. The policy objectives set out in the Circular stated, for example, that harassment and associated behaviour disregards a person's dignity and is contrary to the interests of the Organisation. It is also stated that harassment will be taken seriously, and, accordingly, the goal of the policy was to provide the confidence to encourage staff members to bring such complaints without fear of ridicule. The Circular provided guidelines for the protection of staff members from harassment. It defined the roles that Managers and Confidential Counsellors are expected to play at the very early stages after a harassment complaint is made to facilitate its prompt informal resolution. It also provided a procedure for the formal resolution of

such complaints. Article 11 required the formal procedure to be completed and the Ombudsman's report to be produced within three months of the receipt of a written harassment complaint.

14. Circular No. 286 entered into force on 1 June 2005 for a three-year trial period. It was to be subjected to a yearly review by a joint working group. The group should have made recommendations to the President on changes to the guidelines. Article 18(2) of the Circular provided, in effect, that the guidelines contained in the Circular were to continue to apply pending the President's decision on these recommendations.

15. The evidence plainly shows that the EPO failed in its duty towards the complainant to provide a prompt resolution for his complaint of alleged harassment in PD 5.1. The complainant lodged his second written harassment complaint on 17 June 2008 and there was no resolution of it by the time he filed the internal appeal on 17 June 2009. This was too long and in breach of the EPO's duty of care to him to take prompt measures to deal with such a complaint. This breach entitles the complainant to moral damages.

16. The Tribunal however makes it clear that, while it considers the investigative process was flawed on account of the delay, it does not follow that the complainant was in fact subjected to harassment or inappropriate behaviour. That question will be determined in due course in the relevant proceedings on his relevant underlying internal appeals.

17. The complainant seeks material damages. The Tribunal makes no award under this head as the complainant has not proved actual loss. Neither does the Tribunal award exemplary damages as this is not a proper case in which to do so. The Tribunal will award the complainant moral damages in the amount of 4,000 euros, inclusive of the 1,000 euros awarded in the impugned decision. As he succeeds in part, the complainant is also entitled to costs, which are set at 3,000 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 4,000 euros in moral damages, inclusive of the 1,000 euros awarded in the impugned decision.
2. It shall also pay the complainant 3,000 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2014, 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 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
HUGH A. RAWLINS
DRAŽEN PETROVIĆ