119th Session **Judgment No. 3431**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr V. K. against the European Patent Organisation (EPO) on 4 February 2011;

Considering the letter of 11 March 2011 in which the Organisation requested to be allowed to confine its reply to the issue of receivability on the grounds that the EPO had tried to notify the complainant of its decision of 1 December 2010 to reject his request for review and to register his internal appeal, which was still pending, the complainant's comments on this request, which he submitted on 28 March 2011, the Registrar's letter of 31 March informing the EPO of the stay of proceedings pending a decision by the President of the Tribunal, and the Registrar's letter of 4 November 2011 informing the EPO that its request had been rejected;

Considering the EPO's reply of 6 February 2012, the complainant's rejoinder of 12 March, and the EPO's surrejoinder of 10 April 2012;

Considering Article II, paragraph 5, 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 on 1 November 2009 as Examiner at grade A1. In accordance with Article 13(1) of the Service Regulations for Permanent Employees of the European Patent Office (hereinafter "the Service Regulations") his appointment was subject to a one-year probationary period.

In September 2010 his supervisor, Mr Z., signed his final performance report in his capacity as reporting officer and recommended dismissing the complainant at the end of his probationary period, on the ground that his work had proved inadequate. Two previous interim reports outlining areas of difficulty had been carried out in March and in June 2010, pursuant to Article 13(2) of the Service Regulations.

By a letter of 24 September 2010 the complainant was informed that, on the basis of the considerations contained in his performance reports, the President had decided to dismiss him with effect from 1 November 2010.

The complainant lodged an appeal on 8 October 2010 challenging the decision of 24 September on the ground that, due to a long period of sickness (13 days in July and 14.5 days in August), he had not received a fair opportunity to remedy the problems identified during the probationary period. He requested an extension of the probationary period of no less than three months and the opportunity to work in a different Directorate for that period. In the alternative, he claimed damages in the amount of one year's salary. He also claimed 15,000 euros in moral damages, as well as costs.

A letter of 1 December 2010 was supposed to inform the complainant that his requests had been rejected and that his appeal had been referred to the Internal Appeals Committee (IAC). Concluding that the rules had been correctly applied the President noted in particular that the complainant had encountered performance problems from a very early stage, which had been closely monitored, but that the two interim reports written prior to his sick leave period had already established that he did not possess the skills required from an average examiner. It appears that the complainant never received this letter, which is why he filed a complaint in February 2011 against the implied decision to reject his internal appeal. The complainant considered on 8 December 2010, pursuant to Article 109(2) of the Service Regulations (which provides that if no decision is taken within two months from the date on which the internal appeal was lodged, the appeal shall be deemed to have been rejected), that his appeal had been implicitly rejected. That is the impugned decision.

B. The complainant contends that the impugned decision is formally flawed and overlooks essential facts and/or that clearly mistaken conclusions were drawn from the evidence. In particular, he submits that he was not given a fair chance to improve himself due to his sick leave for a substantial period of time (27.5 days) between the second interim report and the final report. His supervision by two coaches rather than one was detrimental to his learning process, and the measure taken in June 2010 to have a single coach supervise him was not allowed sufficient time to yield results. Consequently, he was deprived of a fair opportunity to show that he could improve in all aspects of his performance which were considered insufficient in his second interim report and were used as grounds for dismissal. He also alleges that his supervisor's refusal to grant him an extension of the probationary period was motivated by personal animosity and bias rather than based on objective criteria. He asks the Tribunal to quash the impugned decision and to award him compensation for loss of salary and pension rights until 31 October 2011. He seeks moral damages in the amount of 15,000 euros, as well as costs.

C. In its reply the EPO recalls that the decision to dismiss the complainant at the end of his probationary period is discretionary and subject to only limited review. There is no flaw in the decision, as the complainant was given clear objectives at the beginning of his probationary period and warned promptly and regularly – through meetings and reports – that his performance was inadequate. He was given feedback with specific and objective criteria to improve his work, and measures were taken to help him redress the situation, such as the close supervision of his work by two coaches. The EPO therefore fulfilled its obligation to act in good faith and fulfilled its duty of care. It denies that the decision overlooks an essential fact, as his sick leave was taken into account by his supervisor in the final report. It was, in any case, not his productivity but the quality of his work which jeopardized his appointment and he was informed of his insufficiencies promptly and given the chance to redress the situation. However, the quality of his work did not improve sufficiently throughout the probationary period, as he simply did not possess

the technical background necessary to develop into a satisfactory examiner and he would not have been able to overcome such insufficiencies in an extended probationary period. The decision not to extend his probationary period was therefore justified. The complainant never mentioned any problem with having two coaches prior to his comments on the first interim report and, when his supervisor proposed to switch to a single coach, the complainant refused. It was only after the complainant requested a change in his coaching arrangements in June 2010 that he was given a single coach and during this period the quality of his work did not improve. The EPO denies his claims of personal animosity. The evidence submitted shows, on the contrary, that the Director displayed great objectivity by underlining the complainant's personal qualities and noting areas of improvement.

D. In his rejoinder the complainant presses his pleas and maintains that his supervisor's decision not to recommend the confirmation of his appointment was motivated by prejudice.

E. In its surrejoinder the EPO maintains its position in full.

CONSIDERATIONS

1. The complainant challenges an alleged implied decision, by which his internal appeal of 8 October 2010 lodged against the President's decision to dismiss him at the end of his probationary period with effect from 1 November 2010 was rejected. The complainant was employed by the EPO from 1 November 2009 on an appointment that was subject to a one-year probationary period pursuant to Article 13(1) of the Service Regulations. The EPO states that the complainant was dismissed because of unsatisfactory performance during the probationary period. A firm line of precedents of the Tribunal have established that such a decision is subject to only limited review. Accordingly, the Tribunal will not interfere with that decision unless it was made without authority, or in breach of a rule of procedure, or if it was based on a mistake of fact or of law, or overlooked some essential

fact, or amounted to an abuse of authority, or if mistaken conclusions were drawn from the facts. The complainant contends that the decision to dismiss him should be quashed because there is a substantial formal flaw in the decision making. He contends, additionally, that the decision overlooked essential facts and/or reached mistaken conclusions from the evidence.

2. The EPO had a duty to the complainant, during the probationary period, to act in good faith and to honour its duty of care towards him, as a probationer. In keeping with these requirements, the EPO provided clear work objectives for the complainant's guidance from the initial stage of the probationary period. It was also essential that the EPO ensured that the provisions of Article 13(2) of the Service Regulations were observed and that the complainant was provided with supervision and guidance as was necessary during the period.

3. Article 13(2) of the Service Regulations requires the EPO to prepare periodic reports on the ability of the probationer to perform his duties and on his efficiency and conduct in the service. The EPO prepared two interim reports on the complainant's performance in March and June 2010. Both reports contained information that outlined areas of satisfactory as well as unsatisfactory performance. The evidence, particularly from the performance assessment reports, suggests that the EPO provided close supervision of the complainant's work, as well as relevant training for him and took measures to assist him to overcome areas of difficulties. The evidence also shows that, in keeping with its duty of care towards the complainant, steps were taken to draw his attention to and to warn him promptly of the areas of unsatisfactory or inadequate performance. These were done by way of the interim performance assessment reports and a number of meetings during the period. The decision dismissing the complainant was taken on the basis of the interim reports, as well as on the basis of the final report of September 2010, which Article 13(2) of the Service Regulations also requires the EPO to prepare.

4. The complainant contends that assigning two persons to supervise him was not ideal because it created unnecessary duplication of some of his efforts, and thereby hindered rather than assisted him to improve the quality of his work. The complainant first raised this matter in his written comments of 22 March 2010 on his first interim performance assessment report but declined the proposal to assign just one supervisor to him then. When however, he agreed on 15 June 2010 to be assigned to one supervisor, the EPO accommodated him and made that arrangement. The Tribunal finds that the EPO acted in accordance with Article 13(2) of the Service Regulations and sees nothing that suggests that there was a formal flaw in the decision to dismiss the complainant at the end of the probationary period.

5. The complainant alleges that the decision to dismiss him overlooked essential facts and reached a wrong conclusion because his absence from work for a substantial part of the probationary period was ignored. The complainant refers, in particular, to his absence from work on sick leave for 27.5 days in July and August 2010. He argues that this was a particularly critical consideration because it occurred during the period between his second interim and his final performance assessments reports. The complainant states that this and other leave, which he took during that period, meant that he worked only 32.5 days or 42 calendar days in that assessment period. He states that this was insufficient time for him to correct the areas of concern in his performance and to demonstrate that he could have worked at the required level. He insists that had this been taken into account, in addition to the detrimental effect that his supervision by two persons had on his performance, the only possible decision would have been to extend his probationary period by at least three months to give him an opportunity to prove that he had the capacity to work at the level required by the EPO.

6. The Tribunal has considered the matter relating to the appointment of two persons to supervise the complainant in consideration 4 of this Judgment. The Tribunal notes that the final performance assessment report shows that the complainant’s absence

from work for illness was actually taken into consideration. The report states that this circumstance was to some extent mitigated by the modest amount of annual leave that the complainant took. It further states that in "these unusual circumstances" the complainant was given a "good" assessment for his production over the year. However, the report states that while the complainant had shown a high level of interest and motivation, he had shown little initiative and the quality of his work, particularly in the area of searches, remained below what was expected notwithstanding his best efforts.

7. The Tribunal finds that, in these circumstances, the decision to dismiss the complainant is one which the President could reasonably have made on the basis of the performance assessment reports, and given the manner in which the EPO carried out its duty of care and good faith towards the complainant during the probationary period. Moreover, Article 13(2) of the Service Regulations confers a discretion upon the President to extend a probationary period "in exceptional cases" before taking a final decision. The President could reasonably have found that this was not an exceptional case to activate his discretion to extend the probationary period. Additionally, there is no evidence to support the complainant's allegation that the negative aspects of the performance assessment reports were motivated by personal animosity and bias towards him by his supervisor and reporting officer, Mr Z. Accordingly, the complaint is unfounded and will be dismissed in its entirety.

8. The Tribunal does not consider the issue of receivability as the complaint is unfounded on the merits.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ