

C. (No. 5)

v.

EPO

125th Session

Judgment No. 3960

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr P. C. against the European Patent Organisation (EPO) on 13 June 2016 and corrected on 7 July, the EPO's reply of 24 October 2016, the complainant's rejoinder of 26 January 2017 and the EPO's surrejoinder of 11 May 2017;

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

Having examined the written submissions;

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

The complainant, a member of an EPO Board of Appeal, contests decision CA/D 14/15, in which the Administrative Council decided to further maintain his suspension (originally decided in decision CA/D 12/14) while reducing his salary by half until a final decision had been made in his case. The complainant also contests decision CA/D 18/15 in which the Administrative Council, by means of an amendment to Article 95 of the Service Regulations for permanent employees of the European Patent Office, granted itself the power to suspend an employee subject to its authority on reduced or no remuneration for a period of up to 24 months, or longer, before delivering a final decision in the relevant proceedings.

The background facts relevant to this case are to be found in Judgment 3958, also delivered in public this day. Suffice it to recall that

on 3 December 2014 the complainant was placed under investigation for alleged misconduct and was subject to a “house ban” blocking his access to EPO premises, documents and resources. He was requested to hand over any EPO property in his possession and his User ID was blocked. In December 2014, based on a recommendation made by the President of the European Patent Office in document CA/C 8/14, the Administrative Council adopted decision CA/D 12/14 by which it decided to suspend the complainant with immediate effect until 31 March 2015 on full pay, to maintain the house ban and the blocking of his User ID, to request him to hand over all EPO property in his possession, and to designate the Investigative Unit as the competent body to carry out the relevant investigation.

On 22 January 2015 the complainant filed a request for review of decision CA/D 12/14 which, based on the President’s proposal contained in document CA/C 6/15, was rejected by the Administrative Council (decision recorded in document CA/28/15). The complainant was relevantly informed by a letter of 10 April 2015, which is the decision he impugns in his third complaint to the Tribunal.

By a letter of 26 March 2015, the complainant was informed of the Administrative Council’s decision (also referred to in document CA/28/15) to initiate disciplinary proceedings against him while maintaining his suspension on full pay until the end of such proceedings. The Disciplinary Committee issued its opinion on 23 June 2015. It concluded that the complainant had committed misconduct for which the appropriate sanction was dismissal pursuant to Article 93(2)(f) of the Service Regulations. On 25 June 2015 the Administrative Council transmitted to the Enlarged Board of Appeal (EBoA) the Disciplinary Committee’s opinion and requested it to make a proposal for the complainant’s removal from office pursuant to Article 23(1) of the European Patent Convention and Article 12a of the EBoA Rules of Procedure (case 23 1/15). On 17 September 2015 the EBoA decided to reject the Council’s request for the complainant’s removal from office as inadmissible.

On 15 October 2015, on the basis of the President’s proposal contained in document CA/C 19/15, the Administrative Council adopted

decision CA/D 14/15. Considering that the complainant's serious misconduct had now been established by the Disciplinary Committee, the Administrative Council decided, among other things, to further maintain the complainant's suspension while reducing his salary by half until a final decision had been made in his case. On 18 November 2015 the complainant filed a request for review of decision CA/D 14/15.

On 17 December 2015 the Administrative Council adopted decision CA/D 18/15 amending, on a proposal from the President, Article 95(3) of the Service Regulations. By means of this amendment, the Administrative Council granted itself the power to suspend an employee subject to its authority on reduced or no remuneration for a period of up to 24 months, or longer, before delivering a final decision in the relevant proceedings (prior to that amendment the Administrative Council was required under the then applicable version of Article 95(3) to deliver a final decision within four months from the date of suspension). According to the terms of decision CA/D 18/15, said amendment entered into force with immediate effect on 17 December 2015, the date of its adoption, and the immediate effect included suspensions decided under Article 95 of the Service Regulations and "which [were] ongoing on the date of entry into force".

By a letter of 18 March 2016, the complainant was informed that, for the reasons given in the President's opinion in document CA/C 4/16, submitted to the Administrative Council under Article 18(1) of its Rules of Procedure, the Council had unanimously decided at its 147th meeting to reject the complainant's 18 November 2015 request for review of decision CA/D 14/15 as partially irreceivable and unfounded for the remainder. That is the impugned decision in the present proceedings in relation to the complainant's fifth complaint to the Tribunal.

The complainant requests that: (i) the impugned decision be set aside; (ii) the originally contested decision CA/D 14/15, that is, the decision to suspend him on half salary also be set aside in its entirety with full retroactive effect; (iii) he be reinstated in his former post without restriction; (iv) the Tribunal examine his suspension under decision CA/D 18/15 and strike down said decision as unlawful and contrary to the principle of non-retroactivity; (v) he be awarded

compensation and/or moral damages in the amount of “one gross annual salary”, inter alia, for the EPO’s flagrant violation of the rule of law; (vi) he be awarded substantial exemplary damages for the EPO’s egregious failure to fulfil its duty of care and to respect his dignity; (vii) he be reimbursed for all his duly invoiced legal costs; (viii) he be awarded interest at the rate of 5 per cent per annum from the date of his suspension until all amounts awarded by the Tribunal are fully paid; (ix) he be awarded such other relief as the Tribunal deems just, necessary and appropriate. In the event that the Tribunal decides not to grant his request to strike down decision CA/D 18/15, the complainant asks the Tribunal to declare that the version of Article 95 of the Service Regulations that is applicable to the present case is the version in force at the time of adoption of decision CA/D 14/15 on 15 October 2015, and to further declare that decision CA/D 18/15, which was adopted on 17 December 2015, cannot be lawfully relied upon to extend the suspension imposed on the complainant under the terms of decision CA/D 14/15.

The EPO asks the Tribunal to dismiss the complaint as partially irreceivable for failure to exhaust internal remedies and to impugn a final decision, and as unfounded for the remainder.

CONSIDERATIONS

1. By a letter of 18 March 2016, the Chairman of the Administrative Council informed the complainant that the Council, at its 147th meeting on 16 March 2016, based on the President’s proposal included in document CA/C 4/16 of 26 February 2016, had unanimously decided to reject as partially irreceivable and partially unfounded the complainant’s request for review of decision CA/D 14/15. In his fifth complaint to the Tribunal the complainant impugns this rejection.

2. By decision CA/D 14/15 of 15 October 2015, taken on the basis of the President's proposal for disciplinary action against the complainant (document CA/C 19/15 of 25 September 2015), the Administrative Council, "[h]aving due regard to the assessment by the President of the Office of the seriousness of the misconduct at issue", considered that the Disciplinary Committee had established that the complainant had committed: "a. unauthorised disclosure of non-public information and critical opinions relating to Board of Appeal activities outside the EPO, while using pseudonyms; b. spreading accusations and attacks or threats against the EPO and its members, either directly or indirectly using anonymous statements and pseudonyms, both inside and outside the EPO". The Administrative Council also considered that the Disciplinary Committee had assessed the following facts: "a. misuse of Office resources and unauthorised use of software during working hours; b. storage of items defined as weapons under German law and extremist material (including examples of Nazi memorabilia) at the workplace". The Council endorsed the Disciplinary Committee's opinion that the appropriate disciplinary measure for the complainant was dismissal pursuant to Article 93(2)(f) of the Service Regulations. It noted that pursuant to Article 23(1) of the European Patent Convention, the removal from office of a member of the Boards of Appeal was only possible on a proposal from the EBoA. Based on these considerations, the Council decided in the relevant part of decision CA/D 14/15 as follows:

1. The enlarged Board of Appeal is hereby requested to make a proposal for the removal from office of [the complainant].
2. [...]
3. Until [...] a final decision is taken, [the complainant] shall remain suspended and, in consideration of the serious misconduct now established by the Disciplinary Committee, half of his basic salary shall be withheld."

3. The Administrative Council's decision to reject the complainant's 18 November 2015 request for review of decision CA/D 14/15, taken at its 147th meeting on 16 March 2016, as pointed out above, was based on the reasons provided by the President in his opinion included in document CA/C 4/16. The Council, in accordance

with Article 18(1) of its Rules of Procedure, considered the President's opinion that:

- (i) the complainant's request to be heard by the Administrative Council, prior to any decision being taken on his request for review, should be rejected, as this right was not foreseen under the applicable rules;
- (ii) the allegations of bias against the President did not justify derogating from the Administrative Council's Rules of Procedure (specifically, as a preliminary procedural remark, the President noted that "Pursuant to 18(1) of the Council's rules of procedure, it is up to the President to prepare an opinion on the request for review for the Council. The allegations of bias against the President do not justify derogating from these rules in the present case: the President's position on the Disciplinary Committee's opinion is a different matter than that at stake in the present review, and it is worth recalling that in both cases he is not the decision-making authority but it is institutionally foreseen that he expresses his view.");
- (iii) the request for review was irreceivable insofar as it challenged the Administrative Council's endorsement of the Disciplinary Committee's opinion, as well as the Council's request to the EBoA to make a proposal for the removal of the complainant from office. According to the Administrative Council's decision, which followed the President's proposal, these decisions could not be deemed as final decisions adversely affecting the complainant, as they were mere steps in the disciplinary proceedings, which can be challenged only by contesting the Council's final decision at the conclusion of the proceedings;
- (iv) the request for review was receivable only in relation to the claim to set aside decision CA/D 14/15, insofar as that decision provided for the complainant's maintained suspension and the withholding of half of his basic salary, and in relation to the claims for payment of damages and costs; and

- (v) the receivable claims were unfounded in consideration of the serious misconduct established by the Disciplinary Committee and endorsed by the President.

4. The complainant requests that the impugned decision, that is, the decision of 18 March 2016 rejecting his 18 November 2015 request for review, as well as decision CA/D 14/15 of 15 October 2015 to extend his suspension and to withhold half of his basic salary until the adoption of a final decision be set aside; that decision CA/D 18/15 of 17 December 2015, amending Article 95 of the Service Regulations, which allowed the extension of the complainant's suspension, be set aside; that he be reinstated in his former post; that he be awarded compensation, and moral, and/or exemplary damages in the amount of one gross annual salary, together with interest at the rate of 5 per cent per annum on all amounts due from the date of his illegal suspension until the date of full payment; that he be reimbursed for all his duly invoiced legal fees and costs; that he be granted such other relief as the Tribunal deems appropriate; that the Tribunal declare that the version of Article 95 of the Service Regulations that is applicable to the present case was the version in force at the time of the adoption of CA/D 14/15 on 15 October 2015, and further declare that CA/D 18/15, which was adopted on 17 December 2015, cannot be lawfully relied upon to extend the suspension imposed on the complainant under the terms of CA/D 14/15.

5. The complaint is based on the following grounds:

- (i) The extension of the complainant's suspension and the resultant reduction of his basic salary by half violates the principle of non-retroactivity. The suspension was extended by means of decision CA/D 18/15 of 17 December 2015, which by Articles 2 and 3 amended Article 95 of the Service Regulations and expressly provided that it applied also to facts that occurred before its adoption. Article 3 of decision CA/D 18/15 provided that "[t]his decision shall enter into force on 17 December 2015. It shall have immediate effect. The immediate effect shall include suspensions decided under Article 95 of the Service Regulations and which are ongoing on the date of entry into force."

- (ii) The Administrative Council's decision to reject the complainant's request for review of decision CA/D 14/15 was based on the President's flawed opinion contained in document CA/C 4/16 of 26 February 2016, and did not take into account the new situation stemming from the EBoA's decision of 17 September 2015, in case 23 1/15, for which the written reasons were communicated to the Administrative Council on 27 November 2015. Relatedly, the EBoA's decision in case 23 1/15 was preceded by the interlocutory decision of the EBoA on 5 August 2015, in which the EBoA had decided that the objection of suspected partiality, raised by the complainant against the EBoA's chairwoman, was founded, and that, accordingly, the EBoA's chairwoman had to be replaced. In the written reasons for the decision of 17 September 2015, in case 23 1/15, the EBoA decided that the Administrative Council's request for a proposal that the complainant be removed from office under Article 23(1) of the European Patent Convention be rejected as inadmissible, as it did not satisfy the requirements of Article 12a of the EBoA Rules of Procedure. The EBoA stated that the charges against the complainant were vague as "the facts and evidence [were] not set out explicitly enough for [the complainant] to comment on them, [and for the EBoA] to reconstruct and examine them in order to judge for itself, independently of the disciplinary proceedings". The EBoA also proposed the reimbursement of all costs incurred by the complainant in the relevant proceedings.
- (iii) In taking decision CA/D 14/15, the Administrative Council relied on the President's proposal for disciplinary action, contained in document CA/C 19/15, and on document CA/C 15/15 from the Chairman of the Administrative Council, both of which were tainted by bias against the complainant. The President, who also drafted his opinion to the Administrative Council on the complainant's request for review of decision CA/D 14/15 (opinion contained in document CA/C 4/16), in accordance with Article 18(1) of the Administrative Council's Rules of Procedure, had a personal interest in the outcome of the case, and should have voluntarily recused himself, or else should have been recused by the Council on account of a very real and apparent conflict of interest.

6. The EPO requests the Tribunal to dismiss the complaint as unfounded for the parts regarding the suspension and the compensation for damages and costs, and to dismiss as irreceivable the remainder of the complaint. It also asks the Tribunal to declare irreceivable the complainant's request to apply to him the version of Article 95 of the Service Regulations in force at the time of adoption of decision CA/D 14/15, as this request was made for the first time in the rejoinder submitted to the Tribunal.

7. The Tribunal's reasoning regarding the President's conflict of interest in Judgment 3958, also delivered in public this day, is equally applicable in this case, insofar as the complainant impugns the Administrative Council decision to extend his suspension. In that judgment, in consideration 13, the Tribunal said the following:

“[T]here is a conflict of interest on the part of the President. It stems from the fact that the alleged serious misconduct, with which the complainant was charged, might reasonably be thought to have offended the President specifically, directly and individually. This situation, by itself, casts doubts on the President's impartiality. Considering the whole situation, a reasonable person would think that the President would not bring a detached, impartial mind to the issues involved. The argument raised by the President in his opinion to the Council (CA/C 6/15), quoted above, namely that pursuant to the applicable rules the President was acting within his competence and had the power and duty to take all necessary steps to ensure the smooth functioning of the Office, is immaterial. The question of a conflict of interest only arises if the official is competent. Accordingly, the question of competency is not an answer to a charge of a conflict of interest. Hence, the Administrative Council erred in not finding that the President had a conflict of interest in the matter. In this situation, in accordance with the provisions in force, the Council should have sent the matter back to the next most senior official to exercise authority instead of the President, who was precluded from exercising authority because of his conflict of interest (see Judgement 2892, under 11).”

In the present case, the President took part in the proceedings regarding the extension of the complainant's suspension. Prior to taking decision CA/D 14/15, the Administrative Council considered the President's 25 September 2015 proposal for disciplinary action against the complainant contained in document CA/C 19/15, as well as the President's opinion contained in document CA/C 4/16 of 26 February

2016 on the complainant's request for review, drafted in accordance with Article 18(1) of the Rules of Procedure of the Administrative Council. Moreover, the Administrative Council's decision CA/D 18/15 of 17 December 2015, amending Article 95 of the Service Regulations, was also made on a proposal from the President. The original version of Article 95(3) of the Service Regulations provided that "[a] final decision in the proceedings [suspension] shall be given within four months from the date of suspension. If no decision has been given by the end of this period, the employee shall again receive his full remuneration." The amended version of Article 95(3) of the Service Regulations provided that "[a] final decision in the proceedings [suspension] shall be given within the following period, as from the date of the decision to withhold remuneration: (a) 4 months for those employees whose appointing authority is the President; (b) 24 months for those employees whose appointing authority is the Administrative Council. This period may be extended in exceptional cases by decision of the Administrative Council. If no decision has been given by the end of the period specified under (a) or (b), the employee shall again receive his full remuneration." The amendment of Article 95 allowed the extension of the complainant's suspension with reduced pay beyond the four-month term. It can be observed that the setting aside by the Tribunal in Judgment 3958 of the complainant's original suspension decided in decision CA/D 12/14 renders ineffective by itself the successive decisions to extend the original suspension.

8. As a result, the impugned decision of 18 March 2016 to reject the complainant's request for review of decision CA/D 14/15 of 15 October 2015 extending the complainant's suspension, as well as decision CA/D 14/15 must be set aside. The complainant must immediately be reinstated in his former post, and he is entitled to an award of material damages in an amount equal to the deductions from his remuneration made as a result of decision CA/D 14/15 extending his suspension with reduced pay, plus interest at the rate of 5 per cent per annum from the monthly due dates until the date of payment. He is also entitled to an award of moral damages in the amount of 15,000 euros, and to costs in the amount of 5,000 euros.

9. Regarding the other requests and issues, such as the Administrative Council's endorsement of the Disciplinary Committee's opinion, the Council's request to the EBoA to propose the complainant's removal from office, and the alleged unlawfulness of the Disciplinary Committee's opinion, the Tribunal agrees with the EPO that the decisions on these issues are not final, and they may be challenged if and when the final decision is impugned. Likewise, the Tribunal will not deal with certain issues raised by the complainant, such as the unlawfulness of decision CA/D 18/15 and, specifically, its retroactivity, nor with the incompatibility of the disciplinary system now in force with the general principle of the independence of the members of the Boards of Appeal, enshrined in Article 23 of the European Patent Convention. The complainant's individual interest is satisfied by the setting aside of the decisions to extend his suspension and to reject his request for review of decision CA/D 14/15. In this case, concurring with Judgment 3958, the *ratio decidendi* is the following: as it might reasonably be thought that the President was directly, specifically and individually offended by the misconduct for which the complainant was charged, he could not take part in any individual proceedings regarding the allegedly identified author of the alleged misconduct. The President's participation in these proceedings has given rise to the unlawfulness of the individual decisions impugned with the Tribunal. These decisions must be set aside and the President must abstain from participating in any of the proceedings regarding this issue in which he has a conflict of interest.

DECISION

For the above reasons,

1. The impugned decision of 18 March 2016 rejecting the complainant's request for review of decision CA/D 14/15, as well as decision CA/D 14/15 itself, are set aside.
2. The complainant shall be immediately reinstated in his former post.

3. The EPO shall pay the complainant material damages in an amount equal to the deductions from his remuneration made as a result of decision CA/D 14/15, together with interest at the rate of 5 per cent per annum from the monthly due dates until the date of payment, as indicated in consideration 8, above.
4. The EPO shall also pay him moral damages in the amount of 15,000 euros.
5. It shall pay him costs in the amount of 5,000 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 December 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ