L.

v.

EPO

125th Session **Judgment No. 3969**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms D. L. against the European Patent Organisation (EPO) on 6 October 2014 and corrected on 4 November 2014, the EPO's reply of 9 March 2015, the complainant's rejoinder of 27 June and the EPO's surrejoinder of 15 October 2015;

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 may be summed up as follows:

The complainant contests the EPO's decision to impose upon her the disciplinary measure of downgrading.

The complainant joined the European Patent Office, the EPO's secretariat, in 2003. Effective 1 August 2011 she was placed on non-active status due to invalidity and she started receiving an invalidity allowance. At that time, she held grade A3, step 8.

By a letter of 27 March 2012, the complainant's counsel requested that the EPO clarify the meaning of the terms "occasional employment" and "total amount of remuneration" contained in Section VII(1)(b) of the Implementing Rules for Article 62a of the Service Regulations for permanent employees of the European Patent Office. Section VII(1)(b) provides that "[a] person in receipt of an invalidity allowance shall

immediately notify the Office of any gainful, non-occasional employment; in addition, he shall inform the Office of the total amount of remuneration he received [...]". The EPO replied on 25 April 2012 that gainful employment is inter alia self-employment of at least one month's duration and that the EPO must be notified immediately of any such employment and of all remuneration received by an EPO permanent employee.

On 12 March 2013 the complainant's lawyer requested that the EPO confirm the complainant's right to be gainfully employed as a psychotherapist for an average of up to eight hours a week over the course of one year. He explained that the envisaged activity had been strongly recommended by the complainant's treating physician for therapeutic reasons. He added that it would presumably take the form of self-employment and that it was of an occasional nature so as to preclude permanent employment. In the event that the Administration was unable to accede to the complainant's request, the complainant's counsel sought a management review of the decision and asked to be provided with information on the internal appeal procedure.

Further to allegations that the complainant had exercised an outside gainful activity without the EPO's permission while on non-active status, the Administration requested the Investigative Unit to carry out an investigation. Shortly afterwards, the President decided to reduce the complainant's invalidity allowance by 49 per cent. The Investigative Unit submitted its report on 19 December 2013. It concluded that the complainant had committed misconduct and recommended that the Administration consider the imposition of a disciplinary sanction and the re-evaluation of the complainant's invalidity status.

In February 2014 the Administration initiated disciplinary proceedings against the complainant by referring the matter to the Disciplinary Committee. In its opinion of 10 March 2014, the Committee found that by failing to inform the EPO of her intention to work as a psychotherapist, the complainant had failed to act with integrity and had put the EPO's dignity at risk in breach of Articles 5(1) and 16(1) of the Service Regulations. It also found that she had breached Article 14(2) in that, between January and June 2013, she had accepted

payment for her services without having received the EPO's prior approval. The Committee nevertheless also expressed the opinion that the complainant's efforts to clarify her legal position demonstrated that she had acted in good faith. It recommended that she be downgraded to grade A2, step 8, pursuant to Article 93(2)(e) of the Service Regulations.

On 7 April 2014 the President informed the complainant that he had decided to downgrade her in accordance with the recommendation of the Disciplinary Committee with effect from 1 May 2014. He also informed her that he had decided to restore her invalidity allowance to its former level and to reimburse her the part withheld up to that point pursuant to Article 95(2) of the Service Regulations. The complainant requested a review of that decision but the President informed her by a letter of 9 July 2014 that he had decided to maintain his decision of 7 April. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision of 9 July 2014 as well as the earlier decision of 7 April 2014. She requests that she be awarded compensation in an amount equal to the salary and the benefits deducted from her invalidity allowance as from 1 May 2014, i.e. the difference between what she received and what she would have received if she had not been downgraded, together with interest at the rate of 5 per cent per annum. She claims moral damages in an amount to be determined by the Tribunal. She also claims the costs of the internal proceedings in the amount of 15,731.81 euros, the costs of the proceedings before the Tribunal, as well as any further costs she may incur.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant joined the EPO in 2003. In August 2011 she was placed on non-active status due to invalidity and she began receiving an invalidity allowance. Commencing in at least January 2013, while she was in receipt of the invalidity allowance, she engaged in activities for which she was remunerated. It is unnecessary, at this stage, to descend into detail beyond noting that her engagement in these

activities led to disciplinary proceedings and ultimately the imposition of a disciplinary measure.

2. However it is desirable to address, at the outset, a legal issue that is potentially of some significance in these proceedings. The issue is whether the complainant was constrained by the Service Regulations from engaging in the activities referred to in the preceding consideration and, in particular, constrained by Article 14.

3. At the material time, Article 14 of the Service Regulations was found in Chapter 1 "Rights and obligations of the permanent employee", which was in Title II under the general heading "RIGHTS AND OBLIGATIONS". It provided:

> "(1) A permanent employee shall carry out his duties and conduct himself solely with the interests of the European Patent Organisation (hereinafter referred to as 'the Organisation') in mind; he shall neither seek nor take instructions from any government, authority, organisation or person outside the Organisation.
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> (2) A permanent employee shall not, without the permission of the President of the Office, accept from any government or from any other source outside the Organisation any honour, decoration, favour, gift or payment of any kind whatsoever, except for services rendered either before his appointment or for military or other national service during a period of assignment to non-active status and in respect of such service."

4. This provision had two elements relevant to the present proceedings. The first was that it applied, in terms, to a "permanent employee". The second was that a permanent employee could not accept payment from any source outside the EPO without the permission of the President. The expression "permanent employee" was defined in Article 1 of the Service Regulations in the following way:

> "(1) These Service Regulations shall apply to permanent employees of the European Patent Office (hereinafter referred to as 'the Office').

> (2) For the purposes of these Service Regulations, 'permanent employee' means any employee of the Office who has been appointed as probationer or on a permanent basis by a written instrument of the appointing authority."

Article 1 not only defined "permanent employee" but it also declared that the Service Regulations applied to any "permanent employee", reinforcing what is apparent from the terms of Article 14 discussed earlier. At all relevant times the complainant was a "permanent employee".

5. At the relevant time, the invalidity allowance being paid to the complainant was a benefit established by Article 62a of the Service Regulations. That Article was in Chapter 2 "Leave" in Title IV "WORKING CONDITIONS". Article 62a(1) provided that "[a] permanent employee [...] who is found to fulfil the conditions for invalidity set out in the present Article [...] shall cease to perform his duties and receive an invalidity allowance". What is meant by "invalidity" was established by Article 62a(2) which provided that "'[i]nvalidity' means physical and/or psychological incapacity making it definitively and permanently impossible for the permanent employee concerned to carry out, at least on a 50% part-time basis, his duties or similar other duties which might reasonably be assigned to him, i.e. which correspond to his situation, his knowledge and his capabilities".

6. The implementing rules for Article 62a adopted by the Administrative Council and applicable at the relevant time were in a document that contained several provisions concerning the rate of the allowance and the manner in which the allowance should be calculated, and also what was described in the document as the "Earnings rule". The relevant provisions of the implementing rules provided:

> "**VI. Earnings rule**
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> Where a person in receipt of an invalidity allowance is nevertheless gainfully employed, this allowance shall be reduced by the amount by which his allowance together with the remuneration he receives for the said employment exceeds the salary for the highest step in the grade which he held at the time of his recognition as unfit for service.

VII. Double entitlement with other income/benefits

(1) Double entitlement with other income

(a) By gainful employment under Section VI is meant, besides employment outside the Office, any employment pursued therein, and in particular, employment as a temporary, auxiliary, or local official or as an 'employee', and also employment as an expert in receipt of fees.

(b) A person in receipt of an invalidity allowance shall immediately notify the Office of any gainful, non-occasional employment; in addition, he shall inform the Office of the total amount of remuneration he received during the preceding calendar year, the reduction referred to in Section VI thus being calculated on a monthly basis. Express mention of this obligation shall be made in the decision notifying the award of an invalidity allowance."

7. These provisions in the implementing rules are not expressed with any great clarity. However the purpose they serve is clear. It is to create a mechanism of reporting and financial adjustments in order to ensure that the recipient of the invalidity allowance is not overcompensated by the payment of the full allowance during a period of invalidity having regard to income derived from other sources. They did not purport to be, nor could they have been, given their status as implementing rules, a qualification to the overarching obligation on permanent employees created by Article 14.

8. It is true that these provisions contemplated a recipient of an invalidity allowance engaging in gainful employment outside the Office and imposed an obligation to notify of "any gainful, non-occasional employment". Is not entirely clear whether the additional words "non-occasional" limited the type of work that must have been notified to work that was "non-occasional" as well as "gainful". However, the financial adjustment contemplated by Section VI arose simply when the recipient of the invalidity allowance was gainfully employed. The better view, construing these provisions together, is probably that the obligation to notify arose when there was any gainful employment resulting in remuneration leading, at least potentially, to an adjustment in the amount paid by way of invalidity allowance. But it is unnecessary to resolve this issue of interpretation in these proceedings. That is because the decisive foundation of the allegations of misconduct

against the complainant was her failure to obtain the President's permission to engage in remunerative activities, as required by Article 14. Notwithstanding the implementing rules, the complainant was obliged to obtain that permission.

9. The impugned decision of the President in a letter dated 9 July 2014 affirmed, in substance, in the review, the earlier decision of the President of 7 April 2014 to impose a disciplinary measure. One fundamentally important issue was whether the complainant had acted in good faith. The Disciplinary Committee had concluded that the complainant had acted in good faith. The President rejected this conclusion in his decision of 7 April 2014.

10. The overarching legal principles in a case such as the present have recently been discussed by the Tribunal in Judgment 3862, consideration 20. The Tribunal observed:

> "The executive head of an international organisation is not bound to follow a recommendation of any internal appeal body nor bound to adopt the reasoning of that body. However an executive head who departs from a recommendation of such a body must state the reasons for disregarding it and must motivate the decision actually reached. In addition, according to the well-settled case law of the Tribunal, the burden of proof rests on an organisation to prove allegations of misconduct beyond a reasonable doubt before a disciplinary sanction can be imposed (see, for example, Judgment 3649, consideration 14). It is equally well settled that the 'Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made by the primary trier of fact' (see Judgment 2699, consideration 9)."

These observations, as they relate to reports and conclusions of internal appeal bodies, are equally applicable to reports and opinions of a Disciplinary Committee.

11. The Disciplinary Committee's opinion in the present matter is a balanced and thoughtful analysis of the issues raised in the disciplinary proceedings and, on its analysis, the conclusions and recommendations were justified and rational. It is an opinion of a character which engages the principle recently discussed by the

Tribunal in Judgment 3608, consideration 7, that the report warrants "considerable deference" (see also, for example, Judgments 2295, consideration 10, and 3400, consideration 6).

12. In her pleas, the complainant argues that there was no bad faith on her part. The EPO argues, on the other hand, that she did not act in good faith. The reasons of the Disciplinary Committee for concluding that the complainant acted in good faith are set out in a section of the opinion entitled "Mitigating circumstances". The Committee viewed as of "vital import" the guidance provided to the complainant by her lawyer and her doctor. In several lengthy paragraphs of its opinion, the Committee detailed why it believed the complainant had acted in good faith. The Committee's reasoning is compelling. The gist of that reasoning is that the lawyer acting for the complainant focussed particularly and probably unduly on Article 62a and the implementing rules. The Disciplinary Committee appears to have concluded, in the complainant's favour, that the lawyer's focus and conduct supported the view that the complainant was acting in good faith.

13. To similar effect was the Disciplinary Committee's consideration of medical advice the complainant had received. The Committee said: "[we] therefore conclude [...] that her acts were genuinely carried out in the belief that they were therapeutic and recommended by her physician". This was an entirely plausible and justifiable conclusion.

14. In his decision recorded in the letter of 7 April 2014, the President, in relation to the question of whether the complainant had acted in good faith, said:

> "9. I consider the indications mentioned by the Committee that you acted in good faith during the above period as unfounded. In fact, the submitted evidence shows convincingly that both you and your consultants, whose actions can be attributable to you as client, were not transparent towards the Office when seeking general advice on how to interpret the Office's legal framework. Although the idea of working as a psychotherapist had crystallised in you the latest by October 2011, you did not reveal the exact

> nature and extent of this activity when seeking guidance from the Office. You revealed these elements to the Office only in your request dated 27 [March] 2013. However, even then you decided to proceed with your plans for remunerated professional activity as a psychotherapist without waiting for the Office's authorisation.
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> 10. I also note that during the hearing you failed to provide any convincing defence on the above. I thus conclude that you have acted with bad faith towards the Office, that you acted throughout the period 2011-2013 in full awareness of the consequences of your actions and that you have breached the said provisions intentionally."

15. The above analysis contains a material flaw. It introduces into an assessment of whether an individual acted in good faith in the context of disciplinary proceedings a concept that, in this context, is irrelevant and likely to mislead. It may be true that for the purposes of the law of agency as it might apply, for example, to the negotiation and finalisation of contracts, the conduct of a lawyer (and less likely that of a medical adviser) can be treated as the conduct of the lawyer's client. The lawyer, in such cases, is the client's agent. However, it does not follow that, for the purpose of evaluating misconduct, the way the lawyer approaches the resolution of a legal question and interacts with third parties can be attributed to the client, in the sense that the lawyer's conduct is to be treated as a manifestation of the state of mind of the client, above and beyond the conduct of the client herself or himself. While lawyers should act on instructions, it is often the case that, as a practical matter, they have considerable latitude about how they go about acting for the client. In the present case, it cannot be assumed, as the President appears to have assumed, that the lawyer had a sufficient grasp of the Service Regulations to know that Article 14 operated in the way discussed by the Tribunal in preceding considerations, and that Article 62a and the implementing rules did not modify its effect. On final analysis, the lawyer's approach was misconceived but that does not justify the attribution of bad faith either to him or, more importantly, to the complainant.

16. The President has failed to adequately motivate his conclusions and decision for departing from the conclusions of the Disciplinary Committee, failed to establish beyond a reasonable doubt

that the complainant acted in bad faith, and failed to adequately motivate his ultimate conclusion on the disciplinary sanction he imposed and the reasons for it with specific reference to all mitigating circumstances. His decision should be set aside and the matter remitted to the EPO to enable the President to make a new decision.

17. The complainant is entitled to moral damages. The ultimate decision to impose a serious disciplinary sanction was made in circumstances where the complainant was incapacitated by serious mental health issues. This should be reflected in the amount of those damages. The Tribunal assesses those damages in the sum of 30,000 euros. The complainant is entitled to costs assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside and the matter is remitted to the EPO to enable the President to make a new decision in accordance with consideration 16 above.
2. The EPO shall pay the complainant 30,000 euros in moral damages.
3. The EPO shall pay the complainant 8,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 7 November 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Patrick Frydman, Vice-President, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

PATRICK FRYDMAN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ