

P. (Nos. 3 and 4)

v.

EPO

126th Session

Judgment No. 4051

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr G. P. P. against the European Patent Organisation (EPO) on 5 August 2016 and corrected on 7 November 2016;

Considering the fourth complaint filed by Mr G. P. P. against the EPO on 14 February 2017;

Considering the EPO's single reply of 21 June, the complainant's rejoinder of 31 August and the EPO's surrejoinder of 21 December 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 cases may be summed up as follows:

The complainant challenges the decision to dismiss him for misconduct.

The complainant joined the European Patent Office, the EPO's secretariat, in 1996 as a patent examiner based in Berlin, Germany. In February 2014, as he had been on sick leave for more than 250 days during the previous three years, a medical committee was convened in order to determine whether he was still unable to perform his duties and, if so, whether he fulfilled the conditions for invalidity. The Medical Committee met on 20 February and extended the complainant's sick

leave until 31 December 2014. No decision on the question of invalidity was then taken. A follow-up meeting was scheduled initially for 4 June 2014, then for 21 August 2014, but both meetings had to be cancelled.

By a letter of 24 September 2014 the Medical Committee secretariat informed the complainant that in order for the Medical Committee procedure to continue he must complete and return a consent form authorising the exchange of medical information between the Committee members, and must confirm his attendance for a medical examination (on 29 October) no later than 2 October. In addition, he or his treating doctor(s) were to provide the Office's Medical Adviser with all relevant medical information in writing, including a diagnosis, a prognosis and a treatment plan, by 9 October. The complainant's counsel sent the consent form on 10 October and confirmed that the complainant would attend the appointment. He invited the Office to clarify what other information, if any, was required. By a letter of 15 October 2014 the Office gave the complainant "an absolutely last opportunity" to provide its Medical Adviser with a comprehensive medical report by 20 October, failing which the Medical Committee procedure would be discontinued. A report was submitted by the complainant's doctor on 18 October, but the Office's Medical Adviser considered that it was "insufficient for a medical committee". The complainant was informed on 24 October 2014 that, in view of his "obstructive attitude in different procedures aimed at establishing [his] medical condition since 2013" and "the absence of any substantive medical information in [his] file", the Medical Committee proceedings were discontinued.

On 12 January 2015 the EPO sent a doctor to the complainant's home address in order to verify, in accordance with Article 62(13) of the Service Regulations for permanent employees of the European Patent Office, whether his absence on grounds of incapacity was claimed for *bona fide* reasons. As there appeared to be nobody at the complainant's address, the doctor left a letter in the complainant's letter box inviting him to undergo a medical examination at the EPO's premises the following day. The complainant did not appear for this examination. Consequently, the Office informed him by letter of 19 January 2015

that he was considered to be on unauthorised absence as from 12 January and until such time as he made himself available to undergo a medical examination or returned to work.

By a letter of 12 February 2015 the Principal Director of Human Resources informed the complainant that he was suspended from service with immediate effect, as the Office intended to initiate disciplinary proceedings against him for misconduct. On 23 February she submitted a report to the Disciplinary Committee setting out the facts complained of and concluding that the disciplinary measure of dismissal was envisaged. The Disciplinary Committee was invited to provide a reasoned opinion on the case in accordance with Article 102(1) of the Service Regulations. The complainant was charged with the following: breach of the duty to cooperate during medical procedures; breach of the obligation to undergo medical examinations; unauthorised travel away from the place of employment while on sick leave; unauthorised absence from work; breach of the obligation to be present at home during core hours on working days while on sick leave; breach of the obligation to cooperate in good faith by receiving official correspondence, as part of his general duty under Article 14(1) of the Service Regulations to conduct himself solely with the interests of the Organisation in mind; failure to observe the procedure for the registration of sick leave; and, lastly, harassment, in the form of an email he had sent to the Chief of Human Resources in Berlin.

The complainant's counsel submitted a response to the charges. After holding two hearings, the Disciplinary Committee issued a report on 24 March 2015 in which it found that six of the charges were well founded and that, under normal circumstances, the disciplinary sanction of dismissal would be appropriate. However, it noted that the complainant's medical condition might be a mitigating circumstance and concluded that an assessment of his medical condition by a doctor would be necessary before a final decision on the matter was taken.

The complainant's counsel submitted his comments on this report on 21 April 2015, alleging that procedural violations had been committed, that relevant facts had been ignored and that the Disciplinary Committee's findings were based on assumptions rather than on proven facts. By a

letter of 7 May 2015, the President of the Office informed the complainant that, in light of the Disciplinary Committee's recommendation, he had decided to suspend the disciplinary proceedings and to order a medical examination by a medical practitioner chosen by the Office "to examine [the complainant's] fitness to work and to be accountable for [his] actions". He emphasised that the complainant was expected to cooperate fully with the medical practitioner and that the Office reserved its right "to resume the disciplinary proceedings at any time and take a final decision [...] without awaiting the result of the medical examination".

On 19 May 2015 the complainant underwent a medical examination with Dr M. In a detailed report dated 24 June 2015, Dr M. noted that he had already examined the complainant in 2013. He concluded that the complainant was still unable to work and that he was suffering from a medical condition which had already existed in 2013 and for which he had not received adequate treatment. He emphasised that the complainant's treatment needed to be optimised as a matter of urgency. With regard to the complainant's accountability for his actions, Dr M. stated that the complainant's behaviour towards the Office was "not an expression of a trouble-making attitude or of a disrespect for the [Service Regulations], but rather the expression of a pathologically changed perception of his experience and ability to assess his own reality", and that to take disciplinary action against the complainant "would cause harm to him, since his actions have been caused by a disease".

In light of these findings, the complainant was again placed on sick leave. By a letter of 29 July 2015 the Office informed the complainant that Dr M.'s report would be presented to him on 12 August 2015 by another doctor, Dr S., who would also examine the complainant in order to "assess [his] current medical condition and consider the further steps to be taken". The complainant attended this appointment, but differences subsequently emerged between the complainant's treating doctors and the EPO's Medical Adviser as to what treatment he should receive.

By a letter of 23 June 2016, the complainant was informed that the President of the Office had taken a final decision under Article 102(3) of the Service Regulations on the disciplinary proceedings against him.

The President recalled that the charges relating to harassment, unauthorised travel during sick leave, failure to undergo medical examinations, unauthorised absence from work, failure to be at home during core hours while on sick leave and failure to register sick leave properly were, for the most part, considered by the Disciplinary Committee to be proven. He rejected the Committee's conclusion regarding the complainant's alleged non-cooperation during medical procedures, insisting that the complainant was solely responsible for the cancellation of three successive meetings of the medical committee, and likewise its conclusion regarding the complainant's refusal to cooperate in good faith when receiving official communications. The President then referred to events that had occurred following the suspension of the disciplinary proceedings in May 2015, asserting inter alia that the complainant had again left his place of employment without authorisation and that he had repeatedly refused to cooperate in the context of administrative and medical procedures. In view of these developments, he considered that the Office had "no other option than to resume the suspended disciplinary procedure and to take a final decision". The President concluded by stating that, "[f]or the reasons stated above, related to the [disciplinary proceedings] and to your subsequent behaviour, I have decided to dismiss you from service under Article 93(2)(f) [of the Service Regulations] in accordance with the Disciplinary Committee's opinion". The complainant was further informed that he could file a request for review of the President's decision in accordance with Article 109 of the Service Regulations.

The complainant filed his third complaint on 5 August 2016, impugning the President's decision of 23 June 2016. He contends that, contrary to the indications given in that letter, the possibility of filing an internal appeal against a decision taken at the outcome of a disciplinary procedure is expressly excluded by the Service Regulations. Nevertheless, the complainant submitted a request for review to the President on 15 September 2016. This request was rejected by the President in a decision of 15 November 2016, which the complainant impugns in his fourth complaint. In each complaint, the complainant asks the Tribunal to set aside the impugned decision, to declare the disciplinary procedure null and void, to order the EPO to reinstate him in his former grade

and functions as from the date of his dismissal with all the legal consequences that this entails, and to award him compensation for financial and moral injury and costs.

The EPO, which asks the Tribunal to join the two complaints, submits that the third complaint is irreceivable for failure to exhaust internal remedies and that both complaints should be dismissed as unfounded in their entirety.

CONSIDERATIONS

1. In his third complaint filed with the Tribunal, the complainant impugns the President's decision, contained in the letter dated 23 June 2016, in which the President dismissed the complainant, under Article 93(2)(f) of the Service Regulations, for misconduct. He also advised the complainant that he could file a request for review in accordance with Article 109 of the Service Regulations within three months from the date of notification of the decision. However, the complainant filed his third complaint directly with the Tribunal on 5 August 2016, without filing the request for review. He filed his fourth complaint with the Tribunal on 14 February 2017, after having lodged a request for review of the decision of 23 June 2016, which was rejected by a final decision dated 15 November 2016 confirming his dismissal.

2. As the two complaints are based on the same facts and address the same substantial issues stemming from the 23 June 2016 decision to dismiss the complainant from service, the Tribunal finds it convenient to join them.

The complainant has requested oral hearings. The Tribunal is satisfied that the complaints can be fairly and appropriately determined by reference to the written material filed by the parties. Accordingly, no order is made for an oral hearing.

3. It is observed that in a number of instances, the complainant refers to written submissions which had been filed in the course of the internal disciplinary procedure "to make them part of his complaint".

The Tribunal repeats its case law that arguments of fact and law must appear in the complaint itself, supplemented in the rejoinder, if necessary and “that those arguments may not consist of a mere reference to other documents, as that would be contrary to the [Tribunal’s] Rules and would render it difficult for the other party to clearly understand the complainant’s pleas [and that] such references are acceptable only as illustrations” (see, for example, Judgment 3434, under 5).

4. Article 109(1) of the Service Regulations provides that a request for review shall be compulsory prior to lodging an internal appeal, unless excluded pursuant to paragraph 3 of that same article. The decision to dismiss the complainant was taken after the conclusion of the proceedings of the Disciplinary Committee and was not exempted from the review process pursuant to paragraph 3, although it was excluded from the internal appeals procedure pursuant to Article 110(2)(c) of the Service Regulations. The third complaint is therefore irreceivable as it does not challenge a final decision, within the meaning of Article VII, paragraph 1, of the Tribunal’s Statute, which requires that all internal means of redress be exhausted prior to filing a complaint in the Tribunal. Consequently, the third complaint must be dismissed and the Tribunal will examine only the issues raised in the fourth complaint, which is receivable.

5. Consistent precedent has it that disciplinary decisions are within the discretionary authority of the executive head of an international organization and are subject to only limited review. In Judgment 3297, consideration 8, the Tribunal stated that it will interfere only if the decision is tainted by a procedural or substantive flaw. Additionally, the Tribunal will not interfere with the fact findings of an investigative body unless there is manifest error (see, for example, Judgment 3872, consideration 3). In disciplinary matters, the burden of proof lies with the employer, which must demonstrate that the complainant did indeed engage in the conduct of which he was accused (see, for example, Judgments 3297, consideration 8, and 3875, consideration 8).

6. The complainant challenges the impugned decision on procedural and substantive grounds. He invites the Tribunal to set it

aside on the grounds that it violated due process; that it has not been established that he breached any obligations under the applicable Service Regulations; that “the reasoned opinion of the disciplinary committee and the decision of 23 June 2016 have been taken on an inaccurate and incomplete factual basis”, and that the decision to dismiss him is disproportionate. The complainant asks the Tribunal to reinstate him in his former grade and functions and to order that he be paid “reparation of all financial and moral damages”. He further states that “[a]s the decision reveals that [he] is subject to arbitrary treatment by the Defendant, in violation of the Office’s duty of care, the [EPO] is liable for moral damages”.

7. The Tribunal determines that the opinion of the Disciplinary Committee was procedurally flawed because, contrary to Article 101(2) of the Service Regulations, the Committee did not permit the complainant to call the witnesses whom he had named. Article 101(2) relevantly states as follows:

“When the employee concerned appears before the Disciplinary Committee he shall have the right to submit observations in writing or orally, to call witnesses and to be assisted in his defence by a person of his own choice.”

The Tribunal does not accept the EPO’s submission that “the fact that the Disciplinary Committee deemed unnecessary, within its discretion, to hear the Complainant’s witnesses, is [...] irrelevant as it did not prevent him from preparing his defence, under Article 101(1) of [the Service Regulations], and [from] reply[ing] [in] writing and orally to the charges raised in the Report”. This is because Article 101(2) was in mandatory terms and did not confer discretion upon the Committee to determine whether or not to permit named witnesses to be called. By not permitting the complainant to call his witnesses, the Disciplinary Committee violated Article 101(2) of the Service Regulations.

8. However, the opinion of the Disciplinary Committee was not procedurally flawed by reason that the lots by which the Committee members were selected were drawn in the complainant’s absence or by reason that the Committee maintained the scheduled date (23 March 2015) for hearing of the matter, as the complainant contends. Pursuant

to Article 97(1) of the Service Regulations, the Disciplinary Committee was constituted by a Chairman and four members. The President had appointed the Chairman of the Committee, as Article 98(1) required. Article 98(2) required the Chairman to select the four members by drawing lots from among the names on the lists drawn up in accordance with Article 98(1). Two members were to be drawn by lots from the list of names submitted by the President and two were to be selected from the list submitted by the Staff Committee. Under Article 98(2), the lots were to be drawn in the presence of the complainant “[w]ithin five days of receipt of [the] communication from the President of the Office initiating [...] disciplinary proceedings”.

The Office informed the Chairman that disciplinary proceedings had been initiated against the complainant by a letter dated 23 February 2015, in view of his “continuous and persistent non-cooperation at all levels”, in spite of “the Office’s disproportionately high efforts to seek a solution”, which amounted to misconduct justifying dismissal under Article 93(2)(f) of the Service Regulations. By a letter of the same date, the Chairman informed the complainant of this and further, that the lots were scheduled to be drawn the following day: Tuesday 24 February 2015, at 4:30 pm. That letter also informed the complainant that he was entitled to be present or to authorize another person, in writing, to be present on his behalf. He was required to inform the Office whether he intended to attend in person by 7:00 pm at the latest on the same day (23 February 2015). The letter then stated that if he could not attend in person he could do so via video-conference while a staff member of his choice from Munich attended on his behalf. The letter also informed the complainant that, in accordance with Article 101(1) of the Service Regulations, he had not less than 15 days from the receipt of the report to prepare his defence. He was thus invited to submit his written comments on the report by 10 March 2015 and was informed that the hearing of the case was scheduled for 23 and 24 March 2015 in Berlin.

9. The complainant’s evidence is that although he was represented by a lawyer at the time, the Chairman’s letter of 23 February 2015 was sent directly to him and he received it around 5:45 pm. He did not open it because of his health condition, but passed it on to his lawyer the same

afternoon. His lawyer was not at his office and only took notice of the contents of the letter the following day. On 2 March his lawyer requested that all documents should be served on him (the lawyer), referring to medical certificates stating that the Office should refrain from contacting the complainant directly to avoid worsening his medical condition. He also informed the Committee that he would be on long-planned vacation from 9 to 23 March 2015 and asked that the hearings not be scheduled during that period or that hearings already scheduled during that period be rescheduled. He was however informed on the following day that the scheduled hearing for 23 March 2015 would be maintained.

10. The Tribunal accepts the EPO's submission that in the absence of a specific power of attorney from the complainant the Disciplinary Committee cannot be faulted for having notified the complainant directly in that first communication to him. Nevertheless, the Tribunal is concerned that the EPO has not explained why it was necessary to have given the complainant such a short notice when the drawing of lots would still have been within the five days requirement under Article 98(2) had it been conducted a day or two later. However, the complainant was informed of the composition of the Disciplinary Committee on 3 March 2015 and did not object, pursuant to Article 98(5) of the Service Regulations, to any of its members, who were selected by the drawing of lots; he was represented by lawyers during the two days of the hearing; he had the opportunity to state his case, orally and in writing, and submitted his three written briefs for the hearing about two weeks before it was conducted. The disciplinary procedure was therefore not procedurally flawed because lots were drawn in the complainant's absence or because the Disciplinary Committee maintained 23 March 2015 as the hearing date.

11. The President's decision to request the complainant to undergo a further medical examination to determine whether his medical condition may have guided his behaviour and affected his accountability for his actions accorded with the exercise of the EPO's duty of care towards the complainant, as was recently explained by the Tribunal in Judgment 3972.

12. In the present case, the Disciplinary Committee expressly found in its report to the President that a medical assessment would be necessary before any decision on the complainant's misconduct could be taken. The President accepted that recommendation and ordered the medical assessment, as the duty of care required. The medical expert submitted his conclusions, the gist of which was that: (a) the complainant had a serious medical condition and was not accountable for his actions; (b) any disciplinary sanction would therefore be inappropriate; (c) he urgently needed different treatment; (d) retirement on invalidity grounds was not recommended at that stage, as it was necessary to see how the complainant would respond to more appropriate treatment; (e) it was important to bring about better cooperation from the complainant and his doctors.

13. Given that the findings of the medical expert were quite unequivocal as to the complainant's non-accountability for his actions (that is to say the actions with which he was originally charged), the Tribunal considers that the only decision that the President could legitimately take at that stage was to close the disciplinary case without any sanction. Instead, partly on the basis of subsequent events (which were not comprehended in the initial charges and hence were never examined by the Disciplinary Committee), the President, in error and in violation of due process, re-opened the suspended disciplinary proceedings and, in the letter of 23 June 2016, imposed the disciplinary sanction of dismissal upon the complainant. That dismissal decision, as well the impugned decision of 15 November 2016 which confirmed it, must therefore be set aside.

14. In the foregoing premises, the EPO will be ordered to reinstate the complainant with effect from 23 June 2016 with all salaries, allowances and benefits, however, deducting the amounts which it has paid him since that date. The EPO shall also pay the complainant moral damages in the amount of 10,000 euros on account of its violation of its rules. He will also be awarded 7,000 euros costs.

DECISION

For the above reasons,

1. The impugned decision dated 15 November 2016 is set aside, as is the original decision of 23 June 2016 to dismiss the complainant.
2. The EPO shall reinstate the complainant in accordance with consideration 14 of this judgment.
3. The EPO shall pay the complainant moral damages in the amount of 10,000 euros.
4. The EPO shall also pay him 7,000 euros in costs.
5. All other claims in the fourth complaint are dismissed, as is the third complaint.

In witness of this judgment, adopted on 9 May 2018, 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 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ