

The Administrative Tribunal,

Considering the complaint filed by Mr M.P. S. against the European Patent Organisation (EPO) on 21 March 2007 and corrected on 29 March and 16 April, the EPO's reply of 7 August, the complainant's rejoinder of 18 September and the Organisation's surrejoinder of 31 October 2007;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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 is a British national born in 1959. He joined the European Patent Office, the secretariat of the EPO, as a permanent employee on 1 June 2003. He was appointed storage administrator at grade A3 in the Directorate of Operational Services in Principal Directorate Information Systems in The Hague. His appointment was subject to an initial probationary period of one year. Prior to that, from June 2002 to May 2003, he had worked for the Office as a contractor.

In September and October 2003 he followed a German language course and was not deployed in his department. On 29 October 2003 the Director of Operational Services, who was also the reporting officer, signed the interim report on the complainant's probationary period. He stated that his quality of work was good, but that it was difficult to judge the quantity of his work and to provide more comments because the complainant had only worked in that position for three months. He recommended that the complainant be told that he was progressing satisfactorily. The latter signed his interim report on 31 October 2003 without making any comments.

On 20 February 2004 a meeting between the complainant and his director was convened to discuss the status of storage work. The director summarised the conclusions in an e-mail of the same date to the complainant and his line manager. A follow-up meeting, which was also attended by the complainant's line manager, took place on 24 March. The conclusion, as reflected in the minutes of the meeting dated 26 March, was that the complainant was still not up to the standard of his role as group coordinator. A further follow-up meeting, although initially scheduled for 22 April, was convened earlier, on 7 April 2004. Referring to that meeting, as well as the meetings held on 20 February and 24 March respectively, the director informed the complainant by letter of 8 April 2004 that the quality of his work, his commitment and his attitude as coordinator of the storage management group were not progressing satisfactorily. He warned him that unless there was visible improvement in the next few weeks, he would not be in a position to confirm his appointment.

On 23 April 2004 the director signed the final report on the complainant's probationary period. He stated that the quality and quantity of his work had been below average, adding that he had not shown sufficient personal interest and investment in driving the projects related to the EPO storage environment and in improving daily administration procedures. He considered that he was more inclined to distribute work and tasks than to assume the technical leadership. While recognising that his technical skills were good in specific areas, the director concluded that he was not suitable for the post and recommended that his appointment should not be confirmed. The complainant signed the report and submitted his comments thereon on 3 May 2004. He strongly disagreed with the director's remarks, asserting in particular that the technical resources and the staff were insufficient and that he was unfairly blamed for shortcomings in the organisation of the directorate which were not under his control. He also argued that the report was full of "vague, unspecific value-judgements" and that he had not been given a reasonable opportunity to address the perceived problems. Nonetheless, he stated that he would consider an offer of a suitable alternative position, such as examiner. The director replied in writing on 18 May 2004. He stated that the complainant's argument based on shortcomings in the directorate's organisation was not valid, given that those shortcomings had been addressed in the past and improvements had been made. He maintained that the complainant had been informed of his unsatisfactory performance but that he had failed to understand that his role was not only to distribute tasks but also to provide technical leadership and support.

By letter of 25 May 2004 the Vice-President of the Directorate-General of Administration (DG4) notified the complainant that, in accordance with Article 13, paragraph 2, of the Service Regulations for Permanent Employees of the European Patent Office, he would be dismissed with effect from 1 June 2004. He also informed him that his request for employment in a different position could not be granted, as no suitable position was available.

On 12 August 2004 the complainant lodged an internal appeal against the decision to dismiss him, claiming that it was “defective in form and substance”. In a letter of 24 September 2004 the Director ad interim of the Employment Law Directorate informed the complainant that the President of the Office had decided that the decision to dismiss him was justified and that the matter had therefore been referred to the Internal Appeals Committee.

In an opinion dated 26 October 2006, a majority of the Committee’s members held that there was no indication of any formal or substantive flaws which would justify the setting aside of the contested decision and recommended that the appeal be dismissed as unfounded. In a dissenting opinion, a minority of the Committee’s members found that due to management errors, in particular the fact that no job description had been provided to the complainant in breach of the Service Regulations, the complainant had not been given the opportunity successfully to complete his probationary period. It considered that he had not been supported and that he had not been given adequate warning and enough time to address deficiencies. It recommended that he be paid compensation equivalent to a minimum of six months’ salary. By letter of 21 December 2006 the complainant was informed that, in accordance with the majority opinion, the President of the Office had decided to reject his appeal as unfounded. That is the impugned decision.

B. The complainant submits that the decision to dismiss him is wrongful and unlawful. He argues that the majority opinion of the Internal Appeals Committee, on which the impugned decision is based, failed to take into account his testimony but accepted uncritically the position put forward by his director. In his view, the Committee condoned the Administration’s defiance of procedural rules designed to protect staff members and especially probationers, and afforded it a measure of discretion far greater than that which is accepted by the Tribunal as lawful. He contends that, as confirmed in the minority opinion, he was treated in an improper manner and was not given the opportunity successfully to complete his period of probation because of serious management errors. His director had no clear picture of the number of staff in the directorate or the assignment of responsibilities. He accuses him of bullying treatment, personal animosity and failure to follow proper procedures.

The complainant asks the Tribunal to order the confirmation of his appointment and his reinstatement in an appropriate position or, alternatively, the payment of damages equivalent to two years’ salary “with tax due on this”. In addition, he claims compensation equivalent to one year’s salary for the non-extension of his probationary period; a minimum of 5,000 euros in compensation for damage to his health; a further award of at least 5,000 euros for damage to his professional reputation; exemplary damages for wrongful dismissal, failure to “conduct a proper probationary period” and injury to his dignity; and costs. He further requests the “[r]etraction of the comments made and their removal from all records”.

C. In its reply the EPO submits that the complaint is irreceivable insofar as it concerns the claim for the “[r]etraction of the comments made and their removal from all records”. Relying on the case law, it argues that under Article II, paragraph 5, of its Statute, the Tribunal is not competent to issue injunctions for public denial of statements.

On the merits the Organisation asserts that the decision to dismiss the complaint is lawful, as it suffers no procedural or substantive flaws. It contends that the time limits for producing reports on the probationary period were complied with and that the complainant was given sufficient time to reply to the comments made by his director. It refutes the arguments the complainant put forward in his internal appeal concerning the lack of technical resources and staff and the shortcomings in the directorate’s organisation, and argues that he had at his disposal a team, which enabled him to demonstrate his ability as a coordinator, and also sufficient technical resources.

The defendant denies that the complainant had not been given adequate warning of the shortcomings in his performance before 8 April 2004. It contends that he had received, at the meetings of 20 February and 24 March, clear warnings that his performance with regard to his leadership and coordination duties was not up to the Organisation’s expectations. It considers that, contrary to the view put forward by the complainant, the duration of his probation was sufficiently long for his director to assess his suitability.

Recalling that, according to the case law, the Organisation must be allowed the widest measure of discretion in

determining whether someone it has recruited is suitable, it observes that the complainant's technical skills could not counterweigh his inadequacy as a coordinator and manager. It denies that the complainant was not offered proper conditions allowing him successfully to complete his probationary period. In its view, the fact that he had not been given a job description does not constitute proof of failure to inform him that he was expected to perform managerial duties. It invites the Tribunal to dismiss the complaint as irreceivable in part and as unfounded in its entirety and to order the complainant to bear his own costs.

D. In his rejoinder the complainant maintains that he was not given sufficient staff or enough time to improve. There was lack of proper warning. He characterises the decision to dismiss him as arbitrary and argues that the failure to provide him with a job description was "deeply symptomatic of the lack of management clarity". He denies having received orally the "requirements of the job" or that any clear statement of requirements or of failure to perform was ever made by his director, arguing that the comments he was given were too vague to provide any guideline for subsequent conduct.

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

CONSIDERATIONS

1. After working for one year as a contractor for the EPO, the complainant joined the Organisation as a permanent employee in the post of storage administrator at grade A3. His one- year probationary period started on 1 June 2003.

2. In the interim probationary report of October 2003 the complainant's director observed that the complainant was very skilled in storage management techniques, that he had successfully established close contact with the individuals in the storage management group, and that he could have taken more initiative to facilitate the various tasks involved in a particular project. Under the heading "Quality and quantity of the work performed", the director commented that the quality of the complainant's work was good; however, since the complainant had been on language training for two months, it was difficult to judge the quantity of the work performed. In relation to conduct at work, the director noted that the complainant was well integrated into the directorate, had been involved in the on-call support for storage management, and had been helpful to his group while he was away on language training. The director added that given the short period of time, it was difficult to provide additional comments. Under "General comments", the director stated that to complete his integration in the new position upon his return from language training, the complainant, who was very skilled in mainframe technologies, would have to concentrate on systems storage, capacity planning activities and coordination of the storage team. He also indicated that the complainant was progressing satisfactorily.

3. According to a summary of a meeting held on 20 February 2004, referred to as a "storage status" meeting, the director expressed his concern regarding a lack of coordination in the storage management group in three specific areas. The complainant indicated that he "[did] not always feel easy" as a coordinator and felt better in technical activities. The director advised that Information Systems was ready to support the complainant to become stronger in his position as coordinator. To this effect, it was proposed that the complainant would prepare an inventory of the group tasks by the end of February and do a distribution of roles for the team by mid-March. A follow-up meeting was scheduled for 24 March 2004.

4. At the follow-up meeting during a status review of the tasks discussed at the 20 February meeting, it was reported that the inventory of tasks and the distribution of roles had been completed by 3 March and that an inventory of projects still had to be completed. A number of additional matters were discussed. In the minutes of the meeting, the director reported that the complainant was still not up to speed with the overall coordination of the storage group; his involvement in certain listed activities had to be more visible and efficient to drive the group properly, and he needed to concentrate on his role as group coordinator.

5. Although the next meeting was scheduled for 22 April, the director met with the complainant on 7 April. In a letter of 8 April to the complainant, the director noted that his final probation report would have to be completed before 29 April. He confirmed his observations of the previous day, namely, that the quality of his work and his commitment and attitude as coordinator of the storage management group were not progressing satisfactorily. The director advised him that unless there was a visible improvement within the following few weeks, he would not be in a position to confirm his appointment.

6. The complainant was given the final report on his probationary period at a meeting held on 27 April 2004. The director recommended that the complainant's appointment should not be confirmed.

7. On 25 May 2004 the complainant was informed that the President had decided to dismiss him with effect from 1 June 2004. He appealed that decision through the internal appeal mechanism. In its opinion of 26 October 2006 the Internal Appeals Committee recommended by a three to two majority that the appeal be dismissed.

8. The President of the Office adopted the reasons of the Internal Appeals Committee majority and dismissed the appeal on 21 December 2006. In particular, he rejected the minority opinion that the absence of a job description led to a misunderstanding about the complainant's duties and that a sufficient warning and a chance for improvement were not provided.

9. The complainant submits that he was not given a proper warning and opportunity to improve and that the working conditions during the probationary period did not provide him with an opportunity to be fairly assessed.

10. The Organisation contends that the interim report on the complainant's probationary period was not unreservedly good. Further, an attentive reading of this report and of the minutes of the subsequent meetings on the status of storage work shows growing concerns about the complainant's performance. The Organisation maintains that the complainant was given clear warnings. Accordingly, he was, or should have been, aware of the problems and what he could do to remedy them, but failed to do anything. Moreover, the Organisation points out that there is no evidence showing that the complainant sought assistance to correct his shortcomings.

11. It is useful at this juncture to reiterate certain underlying principles and the grounds upon which the Tribunal will intervene in discretionary decisions concerning probationary matters. In Judgment 2646, under 5, the Tribunal stated:

“Before considering the specific arguments, the Tribunal recalls that the reason for probation is to enable an organisation to assess the probationer's suitability for a position. For this reason, it has recognised that a high degree of deference ought to be accorded to an organisation's exercise of its discretion regarding decisions concerning probationary matters including the confirmation of appointment, the extensions of a probationary term, and the identification of its own interests and requirements. The Tribunal stated in Judgment 1418, under 6, that a discretionary decision of this kind will only be set aside ‘if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority’. It also reaffirmed that ‘where the reason for refusal of confirmation is unsatisfactory performance, [it] will not replace the organisation's assessment with its own’.”

12. As to an organisation's obligations to warn a probationer that his or her performance is unsatisfactory and provide an opportunity to improve, in Judgment 2529, under 15, the Tribunal reiterated its well-established case law that “an organisation owes it to its employees, especially probationers, to guide them in the performance of their duties and to warn them in specific terms if they are not giving satisfaction and are in risk of dismissal”. As well, a probationer is entitled to a timely warning so that measures can be taken to remedy the situation (see Judgment 2414, under 23).

13. The Tribunal rejects the Organisation's argument that the interim report on the complainant's probationary period and the minutes of the subsequent status meetings reflect unsatisfactory performance. The interim report contains nothing more than advice for continuing growth in a new position that could be expected in any evaluation of a new employee. Further, the restraint expressed by the director that it was difficult to provide additional comments because of the length of time the complainant was at language training cannot be construed in any way to indicate that the report was less than favourable. In fact, the director recommended that the complainant should be told that he was progressing satisfactorily.

14. Similarly, it cannot be said that the director's remarks at the status meetings amounted to a warning that the complainant's work was unsatisfactory. While the director pointed out aspects of the complainant's work where there was room for improvement, his remarks were again in the nature of advice that could be expected from a supervisor during a period of probation. There was no indication during these meetings that the quality of the work was such that the confirmation of the appointment was in jeopardy.

15. The first and only warning the complainant received was at the meeting of 7 April 2004 and it was confirmed the following day in writing. At that time, he was also told that unless there was “visible improvement in [his] work during the next few weeks” his appointment would not be confirmed. On 23 April 2004 the director signed the complainant’s final report on his probationary period recommending that his appointment not be confirmed. Given the nature of the complainant’s work and that the main area requiring further improvement was in his role as coordinator, a two-week time frame to demonstrate improvement in this type of function was clearly inadequate.

16. In these circumstances, the impugned decision must be set aside.

17. In light of the conclusion the Tribunal has reached on the complainant’s argument that he was not given a proper warning and an opportunity to improve, a consideration of the remaining submission is unnecessary.

18. The complainant seeks the following relief:

- (a) confirmation of his appointment and reinstatement in an appropriate position (in a different hierarchical position);
- (b) failing this, damages amounting to two years’ salary (with taxes due);
- (c) one year’s salary (with taxes due) for the non-extended probationary period;
- (d) compensation for damage to his health of at least 5,000 euros;
- (e) retraction of the comments made and their removal from all records;
- (f) compensation for damage to his professional reputation, of at least 5,000 euros;
- (g) exemplary damages for wrongful dismissal, failure to “conduct a proper probationary period”, and injury to his dignity; and
- (h) legal costs.

19. The Tribunal will not order confirmation of the complainant’s appointment as it has not been established that the appointment would have otherwise been confirmed. Nor will the Tribunal order a retraction of the comments made and their removal from all records as it is beyond its power to make such an order. The Tribunal will order the Organisation to pay the complainant the equivalent of all salary, allowances and other benefits which he would have received for a period of 12 months except for home leave and related allowances; the complainant shall account for net earnings for the period of 12 months following his separation. He is entitled to moral damages assessed at 7,500 euros and costs in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organisation shall pay the complainant the equivalent of all salary, allowances and other benefits which he would have received for a period of 12 months except for home leave and related allowances; the complainant shall account for net earnings for the period of 12 months following his separation.
3. The Organisation shall pay the complainant moral damages in the amount of 7,500 euros.
4. It shall also pay him costs in the amount of 5,000 euros.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 May 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 9 July 2008.

Mary G. Gaudron

Giuseppe Barbagallo

Dolores M. Hansen

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.