115th Session **Judgment No. 3227**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr O. S. against the European Patent Organisation (EPO) on 24 April 2010 and corrected on 6 November 2010, the EPO's reply dated 28 February 2011, the complainant's rejoinder of 14 July and the Organisation's surrejoinder of 27 October 2011;

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, a German national born in 1965, joined the European Patent Office, the EPO's secretariat, in 1991 as an examiner at its Headquarters in Munich. With effect from 1 May 2007 he was transferred to the Office's branch in The Hague, where he currently holds grade A2.

In view of the complainant's serious backlog for the reporting period from February 2004 to April 2005 and in order to enable him to improve his performance, his productivity was subject to a special agreement, concluded on 28 July 2005, between the complainant

and his Director and reporting officer, Mr J. This agreement set productivity targets for two periods: the first was from 15 July to 12 September 2005 and the second from 13 September to 31 December 2005. The assessment of whether or not the targets were met was to be based on the data to be entered by him into two electronic tools, known as "MUSE"[1] and "CASEX"[2], taking into account his actual days of presence in the Office. If the number of actions registered in the CASEX and MUSE systems exceeded the set targets, his productivity for the corresponding period would be considered satisfactory in the relevant staff report.

By an e-mail of 8 September 2005 Mr J. invited the complainant to meet with him on 19 September in order to review the results of the first evaluation period. In this connection he informed the complainant that he had noticed several inconsistencies in the complainant's entries in CASEX, which led him to doubt whether the actions thus recorded had actually been completed. As these entries were simultaneously recorded in MUSE, he feared that the productivity figures shown in that system might be unreliable. He hoped that the complainant would be able to clarify this matter and he asked to see the files concerned.

During the meeting on 19 September 2005 the complainant asserted that he had completed the actions in question in a correct manner and in due time, and he attributed the inconsistencies to computer problems. He was subsequently requested to provide further information to verify his explanations. However, enquiries with the service in charge of the CASEX system revealed that the difficulties described by the complainant could not have been caused by computer problems. The complainant subsequently admitted that he had entered data into the electronic tools before having completed the corresponding actions, and that the final coding of the files concerned had not occurred until the end of the first evaluation period, on 16 September 2009. The complainant's Director therefore concluded that the agreed productivity targets had not been met.

[1] Managing of unified search and examination.
[2] Computer Assistance for substantive examination.

As the Office considered that the complainant had violated his obligations under the Service Regulations for Permanent Employees of the European Patent Office by fraudulently misrepresenting his productivity, it initiated disciplinary proceedings by submitting a report to the Disciplinary Committee on 2 March 2006, in which it proposed to impose upon him the disciplinary measure of dismissal. After having heard the complainant, the Disciplinary Committee concluded, in its opinion of 12 July 2006, that he had entered incorrect data in CASEX and had thus falsified his productivity figures. However, the proposed sanction of dismissal was found disproportionate by the Committee, which recommended instead that he be relegated by three steps. By letter of 11 August 2006 the complainant was informed that the President of the Office had decided to follow that recommendation and to relegate him by three steps as from 1 September 2006.

On 22 August 2006 the complainant wrote to the President requesting a review of that decision. As the President decided to maintain his decision, on 6 November 206 the complainant lodged an internal appeal challenging the decision to impose a disciplinary measure on him. On 26 November 2009 the Internal Appeals Committee unanimously recommended that this appeal be rejected as entirely unfounded, which the President did by letter of 25 January 2010. That is the impugned decision.

B. The complainant contends that the Office, which cited Judgment 1828 in support of its decision to initiate disciplinary proceedings against him, as well as the Disciplinary Committee and the Internal Appeals Committee, committed an error of law in considering that the reasoning in that judgment is applicable to his case. In his view, Judgment 1828 can be distinguished from his case, as his electronic pre-coding of files was carried out in good faith and due to a shortage of time, and as the incomplete files were never sent out, there was no damage to the EPO’s reputation whatsoever.

He also contends that the impugned decision is tainted with procedural irregularity, on the ground that his Director, in his e-mail of 8 September, implicitly agreed to extend the first evaluation period

from 12 September until 19 September 2005. Therefore, he did meet the set productivity targets, and the Disciplinary Committee and Internal Appeals Committee overlooked a significant fact in finding that the date for the submission of his files was 12 September 2005. In his view, the Office also breached the legal principle of *venire contra factum proprium* by extending the deadline until 19 September and subsequently maintaining that 12 September was the date for submission of the agreed files.

Lastly, the complainant contends that the impugned decision breached the principle of equal treatment. Referring to an e-mail sent by the team responsible for MUSE to all examiners at the beginning of 2006, which authorised retroactive coding for actions done in 2005, the complainant argues that he was sanctioned for an action that the Office itself promotes, in violation of the principle of equal treatment.

He asks the Tribunal to quash the impugned decision and to restore retroactively the three salary steps that he lost as a result of the President's decision to relegate him. He also claims moral damages, in an amount to be determined by the Tribunal, for injury to his dignity, as well as costs in the amount of 6,000 euros.

C. In its reply the EPO submits that the complaint is entirely unfounded. It maintains that the complainant's actions, committed by an employee who knew that he was under close supervision due to his poor performance, can only be described as a fraud. Judgment 1828, which was cited by the Office in support of its decision to initiate disciplinary proceedings, is therefore relevant, as the complainant in that judgment had also committed an act with the intention to achieve a false representation of the facts in order to obtain an advantage. The fact that the present complainant, unlike the complainant in Judgment 1828, did not wrongfully obtain a financial advantage or damage the EPO's reputation is irrelevant for establishing the fraud; these aspects are only relevant for the determination of a disciplinary measure that is proportionate to the misconduct.

The EPO rejects the complainant's argument that his Director, in the e-mail of 8 September, implicitly extended the evaluation period.

The agreement signed by the complainant on 28 July 2005 stipulated that the first evaluation period would run from 15 July to 12 September 2005. The fact that the Director invited him for a review meeting that would take place on 19 September can in no way be interpreted as an implicit extension. Moreover, such an interpretation is contradicted by the wording of the e-mail itself, which clearly specifies the dates of the period under review. Consequently, there has been no procedural flaw which would have been overlooked by the Disciplinary Committee and the Internal Appeals Committee. Neither, therefore, has the legal principle of *venire contra factum proprium* been breached.

The Organisation points out that the principle of equal treatment applies only to persons who are in the same factual and legal position. It submits that the complainant was not in the same position as other examiners, since he was under scrutiny due to his poor performance and subject to the terms of the agreement, signed by him on 28 July 2005. Lastly, the EPO contends that his allegation of infringement of his dignity is completely unsubstantiated and unfounded, and it therefore asks the Tribunal to reject the complainant's claim for moral damages.

D. In his rejoinder the complainant presses his pleas. He argues that the Director broke the spirit of their agreement on several occasions, including by checking on his files prematurely while he was absent on leave and by refusing to reduce the number of files to be completed, so as to take into account his six days of annual leave at the end of the evaluation period. Therefore, in his view, the Director acted in bad faith and did violate the principle of *venire contra factum proprium*.

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

CONSIDERATIONS

1. The complainant impugns a decision taken by the President of the Office, communicated to him by a letter dated 25 January 2010, to follow the Internal Appeals Committee's opinion and consequently to dismiss his appeal against the earlier decision to relegate him by

three steps, as from 1 September 2006. It is worth recalling that the Disciplinary Committee, which was seized by the Office to determine whether to initiate disciplinary proceedings, had come to the conclusion that the complainant had knowingly entered inexact data into the electronic tool and thus had fraudulently recorded his productivity figures. The Organisation had requested the complainant's dismissal but the Disciplinary Committee found that measure to be disproportionate in light of all the circumstances and it recommended instead that the complainant be relegated by three steps.

2. The complainant invokes a violation of the prohibition of acting "*contra factum proprium*" as a ground for setting aside the impugned decision. Relying on Judgment 1828, he submits that the Office committed an error of law in the reasoning used to justify the disciplinary measure taken against him. He also submits that the decision is tainted with procedural irregularity and that it breaches the principle of equal treatment.

3. The Tribunal notes that the determination of the complainant's productivity was subject to an agreement concluded between the complainant and his Director and reporting officer, Mr J., on 28 July 2005, in order to reduce the complainant's backlog and to improve his performance. The first evaluation period was from 15 July to 12 September 2005 and the second period was from 13 September to 31 December 2005. The assessment of whether or not the complainant's productivity targets were met for the periods in question was based on the actions entered into the computer system taking into account the complainant's actual days of presence in the Office. It is uncontested that the complainant took six days of annual leave immediately prior to the end of the first period and that, prior to this leave, the complainant entered actions into the tools despite the fact that the corresponding processed actions of the files did not exist in electronic form and that the final coding only took place after the end of the first evaluation period, on 16 September 2005. The complainant initially claimed that computer problems had caused the discord, but that explanation was ruled out by an enquiry and by the

complainant's subsequent admission. Consequently, the Organisation initiated disciplinary proceedings and the Disciplinary Committee, following a hearing of the complainant, came to the conclusion that the complainant had entered inexact data into the electronic tool and thus altered his productivity figures.

4. With regard to the alleged violation of the principle of *venire contra factum proprium*, the complainant contends that his Director extended the first period from 12 September until 19 September 2005 by establishing the date for the review meeting for 19 September. It is observed that the deadline of the first evaluation period was not changed, as the e-mail dated 8 September 2005, by which the Director arranged the date of the review meeting, confirmed that the first period ended on 12 September 2005: "In line with our agreement of 15 July last, it is time for an update on the first part, that is, the period from 15 July to 12 September. So I suggest we meet […] in my office on either 19 or 20 September next, at a time convenient to everyone"[3]. It is also observed that, in spite of the agreement's clear terms, the complainant entered actions into the tools notwithstanding the fact that at that moment the corresponding processing of the files did not exist in electronic form.

5. Regarding the citation of Judgment 1828, which concerns a case of dismissal of an employee for fraud, it is clear that that judgment was reasonably cited to underline that "[e]ven though the amount at stake was not large, an intent to defraud the Organization is a most serious offence. The Organization may expect the highest standards of integrity from its staff; it could not possibly just overlook the fraud; and there was nothing disproportionate about dismissing [the complainant] for the misconduct she had committed." (See Judgment 1828, under 12.)

6. Coming to the last plea, the violation of the principle of equal treatment cannot be invoked here as the complainant's situation

[3] Registry's translation from a French original.

was particular. Indeed, he was kept under close scrutiny from his Director, because of his poor performance; therefore, his case is different from others where retroactive codings had been expressly authorised. It is worth noting that the complainant did not raise before the Tribunal the argument regarding the review of the implementation of the disciplinary measure, held unfounded by the Internal Appeals Committee.

7. All the claims being unfounded, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2013, Mr Giuseppe Barbagallo, Presiding Judge of the Tribunal for this case, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 July 2013.

Giuseppe Barbagallo
Dolores M. Hansen
Michael F. Moore
Catherine Comtet