F. S.

v.

EPO

125th Session **Judgment No. 3964**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. F. S. against the European Patent Organisation (EPO) on 5 June 2015 and corrected on 15 September, the EPO's reply of 28 December 2015, the complainant's rejoinder of 8 April 2016 and the EPO's surrejoinder of 21 July 2016;

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 decision to impose on him the disciplinary measure of dismissal for serious misconduct.

In January 2013 the complainant, who was then a permanent employee of the European Patent Office – the secretariat of the EPO –, sought the prior approval of the EPO's Medical Adviser for a six-week "A-cure" (a cure for absolute medical necessity) which had been prescribed by his doctor. The Medical Adviser approved the cure later that month. During the cure the complainant requested two extensions, which were granted; thus, in the event, the cure lasted from 22 April to 22 July 2013. He sought and obtained reimbursement under the EPO's health insurance scheme of the costs incurred, approximately 97,000 euros.

In November 2013 the Principal Director of Human Resources reported to the Principal Director of Internal Audit and Oversight allegations of misconduct against the complainant. The matter was referred to the EPO's Investigative Unit (IU) for investigation. The EPO also requested the cooperation of the insurance broker responsible for administering its health insurance scheme (hereinafter "the insurance broker"). The insurance broker's Fraud Investigation Unit (FIU) agreed to conduct an investigation concerning a possible fraud committed by the complainant. The main suspicion was that the complainant had not actually received some of the treatments shown on the invoice he had submitted, which implied a collusion between the complainant and the healthcare provider. In its report of 25 July 2014 the FIU concluded that there was substantial direct and circumstantial proof allowing it to consider that the invoice was not genuine.

On 6 October 2014 the IU in turn issued a report, in which it concluded that the complainant had purposefully submitted fraudulent claims to the insurance broker, in particular an invoice of approximately 65,000 euros for alleged medical treatments in relation to a A-cure stay in a six-star resort in Spain in 2013. He had requested reimbursement of the said invoice, which he knew to be incorrect. The IU noted that the insurance broker had already reimbursed approximately 31,000 euros for board and lodging. It recommended initiating disciplinary proceedings.

On 21 October the complainant was informed that, in accordance with Article 95(1) of the Service Regulations for permanent employees of the Office, he was suspended from duties until further notice. On 27 October the Principal Director of Human Resources forwarded the report established in accordance with Article 100 of the Service Regulations to the Chairman of the Disciplinary Committee, inviting the Committee to deliver a reasoned opinion.

After having held oral hearings, the Disciplinary Committee issued its opinion on 25 November 2014, concluding that the following elements had not been established: misrepresentation to the EPO's Medical Adviser, the submission of a fraudulent invoice for reimbursement, unjustified sick leave, that another person had stayed with him at the hotel at the EPO's expense, and undue interference in the investigation process

(interfering with or intimidating witnesses). However, it found that the complainant had failed to cooperate with the IU and recommended that the disciplinary measure of a written warning should be imposed on him.

On 13 February 2015 the President of the Office informed the complainant that he did not endorse the opinion and recommendation of the Disciplinary Committee as, in his view, it contained errors of fact and law, which he detailed. He held that the very serious nature of the offence and its extent justified the disciplinary measure of dismissal. He also considered that the relationship of mutual trust necessary for continuing employment had irretrievably broken down. The complainant was therefore dismissed with immediate effect, but he would receive compensation corresponding to the statutory period of notice. On 4 March 2015 the complainant requested a review of that decision. The President rejected his request as unfounded by a letter of 13 April 2015 but authorized the complainant to file a complaint with the Tribunal if he wished to contest his decision. In accordance with the applicable provisions, the complainant filed a complaint with the Tribunal challenging the decision of 13 April 2015.

The complainant asks the Tribunal to annul the impugned decision as well as the earlier decision of 13 February 2015. He seeks reinstatement with no disciplinary measure being taken against him and with "grade promotion" corresponding to the period of suspension. He claims payment of the salary, allowances, and benefits due under his contract "for the period of suspension during the disciplinary proceedings and wrongful dismissal", together with an award of damages in an amount equivalent to at least three years' salary and emoluments. He further seeks 8,000 euros for breach of confidentiality. Lastly, he claims moral damages and costs.

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

CONSIDERATIONS

1. The complainant was employed by the EPO until he was dismissed by the President for misconduct by letter dated 13 February 2015 (the February letter) with immediate effect. The alleged misconduct

had earlier been investigated by a Disciplinary Committee in accordance with Article 102(1) of the EPO Service Regulations. The Committee substantially found in the complainant's favour. In the main, its conclusions were rejected by the President, who was satisfied the complainant was guilty of the alleged misconduct and sought to explain why in the February letter. A request to review that decision was unsuccessful. The President informed the complainant of this in a letter of 13 April 2015. This is the decision impugned in these proceedings. The alleged misconduct related directly or indirectly to the complainant's stay at a Spanish hotel for an A-cure between 22 April 2013 and 22 July 2013. An A-cure is a cure based on absolute medical necessity according to Article 2 of Circular No. 287.

2. It is convenient to commence a consideration of the impugned decision by focusing on only one, but central, element of the charges against the complainant and its consideration by the insurance broker's Fraud Investigation Unit (FIU) in its report of 25 July 2014, the EPO Investigation Unit (IU) in its report of 6 October 2014 and, importantly, the report of the Disciplinary Committee dated 25 November 2014, as well as by the President in the February letter. That element is whether in relation to the two invoices – one for 31,953.24 euros, for accommodation, and the other for 65,241.00 euros, for treatment – submitted by the complainant in August 2013 to secure reimbursement of a total of 97,194.24 euros from the insurance broker for his treatment at the hotel, a conclusion could reasonably be drawn at the appropriate standard of proof that the invoices (and in particular the invoice for treatment) falsely or fraudulently recorded the treatment the complainant had undertaken and perhaps additionally, if false, the complainant knew they were false or should have known they were. This was at the core of the second charge against the complainant in the report under Article 100 of the Service Regulations and probably the most serious of the charges. The charge was that a fraudulent invoice had been submitted for reimbursement by the complainant.

3. At the time the complainant stayed at the Spanish hotel, a "wellness" centre operated to provide hotel guests with health services, though it was then owned and operated separately from the hotel. The following is recorded in the FIU report. In June 2014 an investigator from the insurance broker and an investigator from the EPO (and others) visited the hotel and spoke to two health professionals practising in the "wellness" centre. One was a licenced physiotherapist, Ms L., and another was a licenced osteopath, Mr T. Ms L. had treated the complainant and when shown the number of treatments recorded on the invoice, said (as recorded in the report) "the [complainant] had never received such a high number of treatments on a daily basis. No customer would and could have received this high number of treatments on any given day due to the limited capacity and resources of the wellness." Ms L. is recorded as saying that one specific treatment recorded in the invoice, coaching, could not have been administered as there was no practitioner in this field at the "wellness" centre. Mr T. is recorded as indicating he was not prepared to talk specifically about the treatment of the complainant but said "as a professional in this field, he would not, under any circumstances, provide treatment with the frequency as mentioned on the invoice [...]. The frequency of the treatments, as claimed by the [complainant] would be detrimental to the patient's health." A conclusion is later expressed in the FIU report that the "visit to the hotel and wellness centre delivered evidence that the number of treatments on the invoice is not correct". Elsewhere in the report there is an observation, based on medical opinions, that the number of treatments was not medically justified. In a section of the FIU report headed "Conclusions", it is said: "[t]here is substantial direct and circumstantial proof that allows us to consider the invoice from [the company running the 'wellness' centre] as not genuine." Later in this section references are made to issues between the owners or operators of the "wellness" centre and the owners or operators of the hotel concerning "accounting irregularities". This appears to be a reference to an allegation that the owners or operators of the "wellness" centre understated, in their reporting to the hotel, the extent of treatment to reduce royalties otherwise payable to the hotel. This led to the final observation in this section of the report that "[the investigators]

need[ed] to question whether [the complainant] set up an agreement with [the owners or operators of the 'wellness' centre] to provide an inflated invoice for reimbursement purposes. This possible collusion [was] hard to prove, however."

4. These questions are also addressed in the IU report of October 2014. The report commences with an executive summary which includes a conclusion of the IU that the complainant had "[p]urposefully submitt[ed] fraudulent claims to [the insurance broker] for [...] medical treatments [...] and request[ed] reimbursement for the payment of said invoice, which [the complainant] knew to be incorrect. [The complainant] had claimed that he had regularly received 8 to 10 treatments per day during his cure stay when, in fact, he had only received less than half that number of treatments per day."

5. The IU report is in a number of sections. Section VI sets out investigation findings, the first of which is that the complainant had submitted to the insurance broker fraudulent reimbursement claims and did so "purposefully". In an interview by the IU, the complainant maintained he had in fact received the treatments as invoiced, i.e. up to 10 treatments per day. The report then sets out the IU's evidentiary case to demonstrate this could not have been correct. Firstly, the number and types of treatment were incompatible with the diagnosed pathology. This conclusion was based on the EPO Medical Adviser's analysis of the treatment claimed in the invoice and his opinion broadly accorded with that of the insurance broker's medical advisers. Secondly, there was an incompatibility between the number and nature of the treatments the complainant received in April 2013 immediately following an accident he claimed to have had and, shortly thereafter, a gastrointestinal disease he suffered. Thirdly, there was a similar incompatibility between the number and nature of the treatments he received in the latter part of June 2013 following a traffic accident and the diagnosis of the injuries (by two hospitals the complainant attended) he suffered.

Fourthly, there was a discrepancy between the treatment claimed in the invoice and the time it would have taken, and the opening hours of the "wellness" centre. Additionally, there was a discrepancy between

periods when the invoice suggests treatment was being undertaken and records (hotel phone records, email accounts) and other information that suggest the complainant was engaged in other activities. Fifthly, the "wellness" centre was not staffed, equipped or resourced to accommodate the types of treatment the complainant claims to have had. Sixthly and seventhly, the information provided in the interviews with Ms L. and Mr T. referred to in consideration 3 above was inconsistent with the treatment claimed in the invoice. Eighthly, the prospect of the invoice being fraudulent was consistent with information gained in an interview with the general manager of the group which owned or operated the hotel to the effect that those who were operating the "wellness" centre had been engaged in fraud (depriving the hotel of revenue by suppressing royalty payments) which included collusion with patients by systematically accepting cash payments that were kept off the books or by collusively producing two sets of invoices, one of which would be provided to the patient, and the other to the hotel. The remaining pieces of evidence referred to in the report as supporting this first finding address the way the complainant paid the amount in the invoice, his failure to provide further documentation to the EPO Medical Adviser, his failure to provide documentation in relation to hospital visits and the lengthy time it took the complainant to provide proof of payment of the invoice. It should be noted that the second finding was that the complainant provided purposefully "false [...] information" to the EPO Medical Adviser.

6. It is appropriate now to consider the approach adopted by the Disciplinary Committee to the question of whether the invoices submitted by the complainant fraudulently misstated the treatment he had undergone. However it is important to note, at the outset, that the question was not whether, broadly speaking, the complainant had undergone treatment of the type identified in the invoices but rather whether he had been treated on as many occasions and with the frequency indicated in the invoices. The view of the FIU and IU was that the invoice overstated the number of occasions and frequency and, to the extent that payment was sought for treatment that did not occur, this involved fraud.

7. The Disciplinary Committee addresses this question under a subheading "Fraudulent invoice knowingly submitted for reimbursement". It first notes that the invoice was genuine and that there was no objection to the authenticity of the invoice itself. By this the Committee is plainly saying that, as a piece of paper with writing on it, it was what it purported to be, namely an invoice stating services provided and itemising the charges. But as the Committee then notes, "[t]he dispute lies in whether or not all the invoiced treatments actually took place". The Committee then considers witness statements of the general manager of the hotel and the statements of the two therapists, Ms L. and Mr T. (referred to in consideration 3 above). What the Committee says about the general manager's statement is equivocal and, in so far as the statement had said there had been suspected fraudulent invoicing, the Committee simply notes that it only concerned the administration of the operator of the "wellness" centre. In relation to the statements of the two therapists, the Committee observes that "[t]hese statements clearly do appear to support the accusations of the Administration that not all of the invoiced treatments took place".

8. However the Committee goes on to consider statements of the prescribing doctor, a psychologist and three therapists. The Committee says that all of these statements "corroborate[d] that the invoiced ***number of*** treatments did actually take place" (emphasis added). The Committee goes on to say that it needed to weigh these five statements against the evidence of the therapists referred to in the preceding consideration. After noting that the five statements were signed and details of the health professionals provided, the Committee says it "considered it very unlikely that five professionals would give false written statements". It goes on to point to what it perceives to be limitations or deficiencies in the accounts of the two therapists mentioned earlier and ultimately accepted that "the number of therapies invoiced was convincingly supported by the witness statements provided by the [complainant]". The Committee goes on to say that the evidence of the complainant concerning his daily routine was plausible and, in effect, rejects arguments of the EPO that at least in certain respects it should not be accepted. The Committee then notes that the FIU had said that "possible

collusion [was] hard to prove" and the Committee indicates it would treat this with appropriate weight given that the FIU was an expert in the investigation of fraud. It also notes that the EPO's Medical Adviser had indicated the intensity of treatment (manifest in the invoice) as not advisable but feasible. The Committee goes on to conclude that it did "not find any conclusive evidence that treatments had been invoiced and not provided nor that the [complainant] may have been involved in a conspiracy or bilateral agreement with [the operators of the 'wellness' centre] to inflate the invoice. Hence the [complainant] did not knowingly submit a false invoice."

9. In his brief, the complainant argues that the President, in the February letter, did not provide adequate reasons for reaching conclusions which differed from those of the Disciplinary Committee (both as to subsidiary factual findings and the ultimate findings concerning guilt) and erred in reaching the conclusions he did about the alleged misconduct. 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 the 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 reasonable doubt could properly have been made by the primary trier of fact' (see Judgment 2699, consideration 9)."

10. In cases of found misconduct based on allegations of fraud resulting in dismissal, the Tribunal has adopted the approach, in order to determine whether a finding of guilt beyond a reasonable doubt could have been made, that it "will not require absolute proof, which is almost impossible to provide on such a matter [involving allegations of fraud or similar conduct]. It will dismiss the complaint if there is a set of precise and concurring presumptions of the complainant's guilt" (Judgment 3297, consideration 8, and, also more recently, Judgment 3757, consideration 6).

11. The President's February letter was divided into several parts. In section (c) of Part II "Legal analysis", the President commences with a conclusion that "[t]he invoice [the complainant] submitted to [the insurance broker] for reimbursement was not substantiated at all by any medical or other documents whatsoever" and in section (d) he commences with the conclusion that the complainant "failed to provide any credible witness statement whatsoever which could, at least retroactively, indicate the validity of the invoice by reference to the frequency of the treatments". In the analysis in the February letter both in section (c) and particularly in section (d), the President challenges the conclusions of the Disciplinary Committee with cogent argument the centrepiece of which was that the "five professionals" whose statements the Committee substantially based its conclusion on, "were fully immaterial for the case as they failed to provide any substantiation to the validity of the contested invoice". This is correct. The substance of the statements of the treating practitioners was that they provided treatment in accordance with the treatment plan in a document dated 23 April 2013 of Dr C., a medical practitioner who had been available to guests at the hotel at the time of the complainant's stay. But that document simply identifies the treatments, by title, the complainant should undergo and says nothing about the frequency with which treatment should be provided. The Committee was in error, as the President points out, in saying that the statements of these practitioners corroborated the "number" of treatments that occurred. The President relied, in particular, on witness statements from Ms L. and Mr T. whose accounts are discussed earlier. The President, in effect, adhered to the view that "the treatments did not take place as invoiced". His reasons

for rejecting the Committee's apparent conclusion to the contrary are cogent and adequate.

12. In the present case the President was entitled to conclude, as he did, that the invoice submitted by the complainant was fraudulent. He made no affirmative finding that it was submitted as part of some arrangement or conspiracy with the operators of the "wellness" centre resulting in the enrichment of the complainant. But it was unnecessary for him to do so. The fact that the President had concluded in a motivated decision that a fraudulent invoice was submitted by the complainant provided sufficient grounds to dismiss him and dismissal was not a disproportionate measure. It may have been different if the complainant had not contested the proposition that the invoice was fraudulent but rather argued that he was unaware it was and his conduct was innocent. But that was not the case advanced by the complainant in the various internal investigations and in the ultimate consideration of the case by the President.

13. In his pleas, the complainant addresses many matters of detail and argues that, on the evidence, particular findings of fact should have been made and that findings of fact made by the President should not have been. If findings of fact were made in the complainant's favour on those matters of detail he addresses in his pleas, they would militate against the conclusion that the invoice was fraudulent. However it was open to the President, on the evidence, to make findings contrary to the findings advanced by the complainant. Consistent with the case law discussed in consideration 9 above, it is not for the Tribunal to assume the role of fact finder and determine, itself, whether the case is made out that the complainant was guilty of the misconduct alleged. Rather 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", in this case the President. The Tribunal is satisfied it could properly have been made.

14. In the result, the complainant has not established that the impugned decision to dismiss him should be set aside, nor has he established, as he seeks, that an order should be made for his reinstatement with consequential orders about material and moral damages. It is unnecessary to address a multitude of subsidiary factual and legal issues raised in the pleas if, as is the case, the dismissal was lawful. However a limited number of specific pleas should be addressed.

15. The complainant argues that several procedural flaws attended the decision-making process leading to the President's decision to dismiss him. The essence of the argument in relation to the first alleged flaw concerns the role of the Principal Director of Human Resources. She had been involved in initiating and prosecuting the charges against the complainant, including signing the report established in accordance with Article 100 of the Service Regulations. She then had been given the power, on delegation by the President, to conduct the "hearing" following the Disciplinary Committee's report as contemplated by Article 102(3) of the Service Regulations. This Article provides that the appointing authority, in this case the President, shall take its decision within one month of the notification of the opinion of the Disciplinary Committee but further provides that the appointing authority shall first give the employee an opportunity to be heard.

In the present case the Principal Director of Human Resources emailed the complainant on 22 January 2015 informing him that she had been empowered (by delegation) to "conduct the hearing" under Article 102(3) of the Service Regulations and invited him to forward to her written comments on the Disciplinary Committee's report and to meet with her if the complainant so desired. The situation was said to contravene a principle reflected in Judgment 1763 that the same person cannot be both "judge and policeman". However the situations are not analogous. In Judgment 1763, the chairman of the Disciplinary Board had been the Head of the Department conducting the initial investigation. The Principal Director of Human Resources had no adjudicative role, in the present case, the same as or even analogous to that of chair. Her function, as contemplated by the Article, was limited to receiving written or oral submissions and providing them to the President.

That she did so is apparent from the President's decision of 13 April 2015 rejecting the complainant's request for a review. This plea is unfounded and is rejected.

16. A second and related alleged procedural flaw is that after the Principal Director of Human Resources invited the complainant to forward written comments and to request a meeting if desired, a request was made by the complainant for information about a variety of things. The written comments included a request for information on the structure of the President's decision, whether there would be a review of both factual and legal conclusions of the Disciplinary Committee, which conclusions of the Committee the President was contemplating changing, what subjects the complainant should address and what final decisions the President was considering making and upon which submissions were being invited.

17. The essence of the complainant's argument is that the failure to provide this information "deprived him of [a] possibility to present his case and therefore of the right to be heard". The complainant cites no provision in the Service Regulations entitling him to such information nor any case law of the Tribunal that supports this argument. In view of the fact that the Service Regulations provide for a right to have the decision of the President reviewed, the right the complainant asserts he had to this information cannot be inferred by implication in the Service Regulations nor, as a matter of principle, can it be derived from the Tribunal's case law. This plea is unfounded and is rejected.

18. The third procedural flaw relates to a piece of evidence referred to and relied upon by the President in the February letter. The evidence was, it appears, not referred to by the Disciplinary Committee in its report. The complainant suggests, not unreasonably, that the President must have had access to the transcript of the oral hearing before the Disciplinary Committee. In its report the Disciplinary Committee records that it provided the transcript to the parties. While it is not entirely clear, it appears the complainant contends his legal advisers never received the transcript though they requested it on two

occasions. Thus there may be a conflict between what is said in the report and what is now asserted by the complainant. But, for present purposes, the Tribunal will assume that no transcript was provided.

The complainant's argument is that the decision of the President was based on evidence "not available to the complainant". However this plea conflates evidence with the record of evidence. It is not suggested by the complainant in his pleas that he or his legal representatives did not attend the oral hearing. Accordingly, he was aware of the evidence and it was thus available to him even if, as a matter of fact, he had not been furnished with a transcript. This plea is unfounded and is rejected.

19. The complainant argues that he could not be dismissed in the middle of the month. Reference is made to Articles 52 and 53 of the Service Regulations. However the relevant provision, Article 53(3), expressly excludes from its scope termination as a result of a disciplinary measure. This plea is unfounded and is rejected.

20. The last plea of the complainant which should be addressed concerns an alleged breach of confidentiality. Prior to the oral hearing before the Disciplinary Committee, it was revealed that potential witnesses from the IU had been provided with a copy of the complainant's rejoinder to the Disciplinary Committee. That rejoinder contained details of the complainant's medical conditions which the complainant had refused to provide during the investigation by the IU. The complainant had not authorised the release of those details to the IU witnesses. Indeed, in the result, the Disciplinary Committee decided not to hear evidence from those witnesses. Irrespective, these events do reveal a breach of confidentiality. This plea is not addressed by the EPO in its reply beyond denying "having allowed investigators access to any sensitive medical information". It does not seek to explain how the information came into the hands of the potential IU witnesses. It can reasonably be inferred that it happened as a result of the conduct of a member of staff of the EPO and for which the Organisation is responsible. But as noted by the Tribunal in Judgment 3284, consideration 28, how it happened is not of any great significance. What is significant is that the complainant's confidentiality was not preserved. The complainant

is entitled to moral damages assessed in the sum of 4,000 euros as the breach does not appear to be so egregious as the individuals to whom the material was sent were themselves bound to keep it confidential.

21. The complainant's case has generally failed, though he has been successful to a limited extent. Accordingly it is appropriate to award him a modest amount by way of costs, which the Tribunal assesses as 1,500 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 4,000 euros as moral damages.
2. The EPO shall pay the complainant 1,500 euros as costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 25 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ