

D. (No. 9)

v.

EPO

127th Session

Judgment No. 4115

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr A. D. against the European Patent Organisation (EPO) on 11 October 2016 and corrected on 21 December 2016, the EPO's reply of 15 May 2017, the complainant's rejoinder of 31 August and the EPO's surrejoinder of 18 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 case may be summed up as follows:

The complainant challenges the decision to downgrade him for serious misconduct.

At the material time the complainant was an employee of the European Patent Office – the secretariat of the EPO – who held grade G13. On 10 November 2015 he was informed that, on the basis of a report established in accordance with Article 100 of the Service Regulations for permanent employees of the Office, the Principal Director of Human Resources had initiated a disciplinary procedure against him and had requested the Disciplinary Committee to issue a reasoned opinion recommending an appropriate sanction. The Administration indicated in the report that the complainant had breached his obligation not to be absent from work from 6 to 27 March 2015

when he had undertaken a cure (violation of Articles 55 and 63 of the Service Regulations), his obligation to ensure that his absence was duly and precisely notified, authorised and recorded (violation of Articles 62 and 63 of the Service Regulations and Rule 13 of Circular No. 22) as well as his specific obligations under the provisions governing annual and sick leave, and his general obligation to act with efficiency and integrity and with the Office's interests in mind (violation of Articles 5 and 14 of the Service Regulations). The Administration stated that it could not be established with absolute certainty that, for the totality of the misconduct of which he was accused, the complainant had acted knowingly and wilfully. In addition to his unauthorised absence, the Administration noted that he had had performance problems since at least 2008. The Administration asked the Disciplinary Committee to assess the performance-related incidents of 2015 as an additional element of misconduct. The Administration considered that an appropriate sanction would be downgrading by one grade.

The Disciplinary Committee issued its reasoned opinion on 24 February 2016. It found that the complainant had breached his professional obligations by being absent without authorisation and that he had committed misconduct by intentionally showing an unacceptable low level of performance and unwillingness to improve during 2015. It therefore recommended downgrading him by two grades.

By a letter of 8 April 2016, the President of the Office notified the complainant that his behaviour amounted to serious misconduct violating the standards of integrity and conduct required of an international civil servant under Article 5(1) of the Service Regulations, as well as his obligations to be present at work, to perform his tasks and to conduct himself solely with the interests of the Office in mind as provided in Article 14(1) of the Service Regulations. He considered that the complainant's misconduct was aggravated by his grade and seniority. He also noted that the complainant had already been reprimanded in 2014 for breach of the rules governing the registration of strike action, leading to another incident of unauthorised absence. Hence, he had decided to follow the recommendation of the Disciplinary Committee. Accordingly, the complainant's grade would be G11/05 as from 1 April

2016. The President added that the complainant could file a request for review of that decision in accordance with Article 109 of the Service Regulations.

On 17 June 2016 the complainant filed a request for review of the decision of 8 April with the President of the Office. He alleged that the Disciplinary Committee's opinion was based on an inaccurate and incomplete factual basis, that the Committee had not taken into account all his requests – in particular with respect to oral hearings – and that the disciplinary procedure was flawed. He requested the President to set aside the decision of 8 April 2016, to declare null and void the disciplinary procedure, and to reassign him to grade G13/05 with effect from 1 April 2016. He also requested compensation “corresponding to the downgrading to grade G11/05”, moral damages and costs.

By a letter of 13 July 2016 the President notified the complainant that he had decided to reject his request as unfounded. He maintained that, in his view, it was fully proven that his absence from work in March was neither authorised by the Office nor covered by annual or sick leave. His request for a cure had been “seen” by his immediate superior but he was nevertheless obliged to officially request annual leave using the proper electronic tool. The President also noted that the complainant had received warnings concerning his underperformance. With respect to the procedure followed by the Disciplinary Committee, the President considered that applicable provisions had been applied and that due respect had been given to the rights of defence. The President further found that the disciplinary sanction was proportionate, stressing that, as concluded by the Disciplinary Committee, there were aggravating circumstances, in particular the long period of unauthorised absence (three weeks) and the complainant's generally lax attitude towards rules on working time, despite his grade and seniority. He noted that the Disciplinary Committee had found no mitigating circumstances. The President emphasised that the complainant had already been sanctioned with a reprimand in 2014 for violating the regulations concerning strike registration, which had led to another incident of unauthorised absence. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision and the decision of 8 April 2016 downgrading him, to declare the disciplinary procedure null and void and to “reassign [him to] grade G13/05 with effect from 1 April 2016”. He also seeks reparation of the financial damages resulting from the downgrading to grade G11/05, and an award of moral damages (approximately 72,000 euros, which corresponds to six months’ basic salary at grade G13/05 after deduction of internal taxes). Lastly, he asks the Tribunal to award him costs.

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

CONSIDERATIONS

1. At relevant times, the complainant was a member of the staff of the EPO. Between 6 March 2015 and 27 March 2015, he was absent from work. That absence and other matters came to be considered by the Disciplinary Committee, which issued a reasoned opinion on 24 February 2016 following the initiation of a disciplinary procedure based on a report issued under Article 100 of the Service Regulations in November 2015. The Disciplinary Committee recommended the downgrading of the complainant by two grades. By letter dated 8 April 2016 the President of the Office wrote to the complainant saying he accepted this recommendation and, accordingly, downgraded the complainant effective 1 April 2016. The complainant sought a review of this decision. By letter of 13 July 2016 the request for review was rejected by the President as unfounded in its entirety. The complainant seeks to impugn this decision in his ninth complaint filed in the Tribunal on 11 October 2016.

2. One central element of the misconduct involved an alleged non-compliance with Article 63 of the Service Regulations. At the material time, that Article relevantly provided:

“Unauthorised absence

- (1) Except in case of incapacity to work due to sickness or accident, a permanent employee may not be absent without prior permission from his immediate superior. [...]

3. It can be seen there is an obligation on a staff member to obtain permission from her or his immediate superior in order to be absent. By necessary implication, without that permission, the absence is unauthorised. The Article does not, in terms, create an obligation to fill out particular forms or follow particular procedures, even though forms and procedures may exist to facilitate the giving of permission by the immediate superior. Nor does the Article concern the approval of annual or sick leave by other people or entities within the Administration, such as the Human Resources Department, unless, perhaps, that approval is a legal condition precedent to the grant of permission by the immediate superior. However the EPO does not, in its pleas, refer to or rely upon any provision with this legal effect.

4. It is possible for permanent employees of the EPO to absent themselves from work for the purposes of undergoing two types of medical cures. One is styled an A cure (cure of absolute medical necessity) and the other is styled a B cure (cure of medical necessity).

5. As a matter of fact, the complainant provided his immediate superior with a "Request for a cure – active staff members" form in February 2015. He did so having by then obtained a prescription from his doctor and also by then having obtained the approval of the health insurance provider. The form related to a B cure. The purpose of the form was evident from the opening lines. It was said to be "For submission to the EPO's medical advisor – to be completed by employee", and then stated: "I hereby request the opinion of the EPO's medical advisor on the degree of necessity and, where appropriate, length of the cure I propose to take". That form, in this case, identified, amongst other things, the dates of the requested cure which were filled in as "06.03.2015 - 27.03.2015". The form was signed by the complainant as the "requester". It was also signed by the complainant's immediate superior in his capacity as the head of the Department/Director. At the very least, the signature of the immediate superior implied some form of conditional approval by him for the complainant to absent himself from work for the specified period and for the specified treatment.

6. In the pleas in his brief the complainant argues that there had been a standard practice that requests signed by the immediate superior were directly notified by the latter to the Human Resources Department and the Medical Advisory Unit (MAU). There was some corroborative evidentiary support for this contention in the Article 100 report concerning the allegations of misconduct of the complainant that recounted, as a matter of fact, that the complainant's immediate superior had informed the MAU of having signed an earlier request by the complainant for a cure in 2014 (an A cure). In those circumstances the complainant did not proceed himself, as he argues in his pleas, with the "registration of [the] cure for sick leave". A submission to the same general effect was, having regard to the Disciplinary Committee's summary of the arguments, advanced by the complainant to the Committee. In both submissions the complainant noted that on 5 March 2015 he sent an email to the Human Resources Department indicating he was on cure from "06.-27.03.2015" and saying "Thank you for taking note".

7. In its reasoned opinion, the Disciplinary Committee noted that at a hearing before it, the complainant "stated that his absence was not for medical necessity but it was duly justified by taking annual leave". The Committee then proceeded to discuss the procedures for requesting annual leave and noted, of the request for a cure submitted in February 2015, that it was "only for information of the [immediate superior] about the intention of the [complainant] to take a cure subject to the approval of the Medical Advisor", and that "it [was] just confirmed by the signature of the [immediate superior] that he ha[d] taken note of the [complainant's] intention but it [did] not indicate by any means a grant of any leave". The Committee concluded that there was no valid request for annual leave and, in consequence, no annual leave was granted to him. Its ultimate conclusion was that the complainant's absence was unauthorised and constituted a breach of his professional duties set out under Article 63. This analysis is flawed in two respects. The first is that whatever the complainant may have said at a hearing before the Committee, the contemporaneous documents and in particular the email of 5 March 2015 make it tolerably clear that the complainant was absenting himself from work for the purposes of undertaking a cure.

Contemporaneous documents are often more reliable than subsequent oral testimony. The second is that the Committee does not address let alone answer the complainant's contention that, having got his immediate superior's signature for the request for cure, it would have been or at least should have been, consistent with standard practice, notified by the immediate superior to the Human Resources Department and the MAU. It is conceivable that the Disciplinary Committee fixed on the absence as "annual leave" because Circular No. 22 ("Guidelines for leave") quite explicitly deals with steps to be taken before taking annual leave (Rule 5) which provided a yardstick to measure whether the complainant complied with those procedures. However Circular No. 22 does not provide explicit procedural guidance in relation to absences "for cure".

8. Indeed in an email dated 11 November 2015 relied on by the complainant in his brief, a staff member of EPO apparently involved in administrative tasks associated with the MAU, set out the procedure for taking a B cure. The first step was for the staff member to obtain a doctor's cure prescription and present it to the health insurance provider for its approval. That approval together with the document signed by the staff member's immediate superior indicating the cure dates together with the doctor's cure prescription should be sent to the MAU. The EPO medical practitioner will, so the email recounts, then evaluate "whether or not the medical criteria for granting half of the time off as sick leave are met. If they are, the Medical Advisory Unit will inform HR Services and they will provide to register 50% of the duration of [the] B cure as sick leave and the other 50% will be **automatically registered as annual leave**" (emphasis added). What is said in this email about procedure is clearly at odds with the much more rigorous procedure in Circular No. 22 to obtain permission to take annual leave. In the former case the contact with the Human Resources Department is initiated by the MAU and the email strongly suggests that nothing need be done by the staff member seeking a B cure to secure annual leave for half or the entire period of the cure. To the same general effect was an email sent to the complainant on 14 January 2014 about procedure, though without some of the detail set out in the email of 11 November 2015.

9. For the preceding reasons, it was not open to the President to be affirmatively satisfied that the complainant had contravened Article 63 of the Service Regulations.

10. The other central element of the misconduct addressed in the Article 100 report and considered by the Disciplinary Committee, was what was perceived to be underperformance by the complainant, that is to say, in the words of the Committee, his “unacceptable low level of professional performance and not being willing to increase performance during 2015”. This characterisation of his conduct was repeated in the President’s decisions reflected in the letter of 8 April 2016 and that of 13 July 2016, the impugned decision. The focus of the assessment of the complainant’s conduct concerning performance within the EPO was that the underperformance was deliberate and thus intended. The Disciplinary Committee described it as an “intentional and conscious refusal to perform his duties”.

11. In his pleas, the complainant advances one particular argument that is decisive. Article 47a of the Service Regulations requires that staff members have a report made on their performance and competencies which is styled an appraisal report. The detailed mechanism to meet this objective is set out in Circular No. 366 entitled “General Guidelines on Performance Management”. As a matter of fact, the disciplinary proceedings initiated by the report prepared under Article 100 of the Service Regulations that focused, in part, on the performance of the complainant during 2015, were commenced some months before the appraisal report for the complainant’s performance during 2015 had been finalised.

12. The mechanism for assessing performance in Circular No. 366 contains a multitude of provisions to achieve a dialogue between the staff member being appraised and those undertaking the appraisal about the assessment of the staff member’s performance before the appraisal is complete and finally documented. Even then, and following the completion of the appraisal, several additional steps can be taken by the staff member including conciliation and an objection to an Appraisals

Committee. The Circular provides that the appraisal report will, in the ordinary course, be drawn up each year and identifies the period for which it is drawn up, namely 1 January until 31 December of a given year. One provision, under the general heading “Performance management cycle”, provides for review meetings and, in particular, intermediate review meetings towards the middle of the appraisal period. The Circular identifies the purpose of the intermediate review as providing feedback on performance and makes allowance for the revision of objectives concerning “the level of achievement” of the objectives earlier set.

13. The complainant’s appraisal report for 2015 appears to have been finalised in March 2016. Of some importance is that the report contains notes about a review meeting held on 15 July 2015. Two points emerge from those notes relevant to these proceedings. The first is that the complainant was told that his level of production was “currently far below [his] objectives and far below what [was] expected from an examiner of [his] grade”. The second was that a special arrangement applicable to him made during the objective setting (seemingly this occurred at the beginning of the appraisal period) was extended until the end of the year. Additionally, the notes record that the complainant “should at least reach a production level which corresponds to” a specified level at the end of the year. The clear import of these notes is that the complainant was being given until the end of the year to increase his productivity.

The disciplinary proceedings were initiated before the appraisal period concluded. In Judgment 3224 the Tribunal said at consideration 7 that an organisation cannot base an adverse decision on a staff member’s unsatisfactory performance if it has not complied with the rules governing the evaluation of that performance. The decision to commence disciplinary proceedings can, for the purposes of the application of this principle, be characterised as an adverse decision. Even if the EPO believed that nothing was going to change, in terms of the complainant’s conduct, between the time the disciplinary proceedings were commenced and the conclusion of the appraisal period a little over a month later, it was nonetheless obliged to complete the assessment of the complainant’s

performance in accordance with Circular No. 366 before initiating the disciplinary proceedings. By taking the course it did, the EPO deprived the complainant of the opportunity of forestalling disciplinary proceedings by meeting, by the end of the year, the objective discussed at the July 2015 meeting.

14. In the result, the decision to impose the sanction of downgrading on the complainant is vitiated by the erroneous approach to the question of whether the complainant took annual leave without the permission of his immediate superior and the question of whether his performance manifested conduct warranting a disciplinary sanction. It is unnecessary to resolve a number of other issues of a procedural nature raised by the complainant as well as other issues of apparent substance.

It is unnecessary to hold an oral hearing as requested by the complainant. The written material provided by the parties has been sufficient to enable the Tribunal to resolve this complaint without such a hearing.

15. The impugned decision should be set aside as also should the original decision of 8 April 2016. The Tribunal notes that the complainant has since retired and separated from service. The EPO shall restore the complainant with retroactive effect to the grade and step he would have held but for the imposition of the disciplinary sanction, with all legal consequences in particular in terms of remuneration and pension rights. The EPO shall also pay him interest on the resulting remuneration arrears at the rate of 5 per cent per annum. The complainant sought moral damages by way of relief but advanced no evidence, or even argument, to support this claim. The complainant is entitled to an order for costs assessed in the sum of 7,000 euros.

DECISION

For the above reasons,

1. The impugned decision and the decision of 8 April 2016 are set aside.
2. The EPO shall restore the complainant with retroactive effect to the grade and step he would have held but for the imposition of the disciplinary sanction, with all legal consequences, in accordance with consideration 15 above.
3. The EPO shall pay interest on the resulting remuneration arrears at the rate of 5 per cent per annum from due dates until the date of payment.
4. The EPO shall pay the complainant 7,000 euros for costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 29 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ