

The Administrative Tribunal,

Considering the complaint filed by Mr H.-J. M. against the European Patent Organisation (EPO) on 10 January 2005 and corrected on 28 January, and the Organisation's reply of 3 June 2005;

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 and the pleadings may be summed up as follows:

A. The complainant, a German national born in 1962, joined the European Patent Office – the EPO's secretariat – on 1 October 2002 as an Examiner at grade A3. He was based in Munich (Germany) and his appointment was subject to a probationary period.

On 27 October 2002 he applied for an expatriation allowance. By letter of 18 November he was informed that his application was rejected because, contrary to the requirements of Article 72(2) of the Service Regulations for Permanent Employees of the European Patent Office, he had not been permanently resident, for at least ten years prior to his appointment, in a country other than the country in which he was serving. Indeed, his curriculum vitae showed two periods of employment in Germany during the ten years preceding his appointment. On 15 January 2003 the complainant lodged a first internal appeal challenging that decision.

On 6 March 2003 he received an interim probationary report in which his supervisor indicated that he was not progressing satisfactorily. In the space provided for his comments, the complainant wrote that the report should be rejected as it did not correspond to the truth, adding that detailed reasons would be provided on request.

As from 11 March 2003 the complainant was absent from work. He had left a leave request covering the period 11 March to 4 April on the desk of his Directorate's Formalities Officer, but the request had not been approved by his supervisor. Having tried in vain to contact the complainant by telephone, the Personnel Department wrote to him on 13 March asking him to return to work. A similar letter was sent on 11 April. The complainant did not return to work, but between 29 and 31 March he sent five letters in which he contested the content of his interim report.

On 24 April 2003 the complainant's supervisor drew up a final probationary report. The opinions expressed in the interim report were reiterated, but his supervisor also referred to the complainant's unauthorised absence from work, and to his letters containing "various demands and requests" and "unsustainable criticisms". He concluded that the complainant was not suited to the job of examiner and recommended that he be dismissed immediately. On 9 May the complainant added comments to the effect that the authors of the report were engaging in a "systematic strategy of deliberately discrediting [his] reputation and outstanding work" and that the report should be rejected. He also pointed out that the details given in the report concerning his absence on leave were incorrect. On 14 May his supervisor added a comment correcting the leave dates he had mentioned, but his appraisal and recommendation remained unchanged.

By a letter of 19 May 2003 the Principal Director of Personnel informed the complainant that, on the basis of his final probationary report, the President of the Office had decided to dismiss him in accordance with the final paragraph of Article 13(2) of the Service Regulations, with effect from 21 May 2003. On 29 May the complainant lodged a second appeal, challenging the President's decision to dismiss him.

The Appeals Committee issued its reports on the complainant's appeals on 19 October 2004. It recommended that his first appeal be dismissed as unfounded. Having recalled the Tribunal's case law regarding the interpretation of Article 72(2) of the Service Regulations, it noted that the complainant had lived and worked in Germany for two periods during the ten years preceding his appointment at the EPO and therefore could not be considered as having been permanently resident abroad during those ten years. With regard to his second appeal, the Committee recalled

that the decision not to confirm a staff member's appointment is discretionary, and found that it was "perfectly lawful" for the Office to conclude, from the complainant's overall performance and his behaviour after receiving the interim probationary report, that his work was "obviously inadequate". Consequently, the decision to dismiss him on the basis of Article 13(2) of the Service Regulations showed no error of discretion and the Committee recommended that the appeal be dismissed. In both reports, the Board rejected the complainant's procedural objection that the EPO's submissions had not been translated from French into German. In this regard, it pointed out that as an Examiner he was expected to have at least a good knowledge of the Organisation's three official languages – English, French and German – and that the rules of procedure governing internal appeals allow the parties to use any of these languages.

By a letter of 2 November 2004 the Director of Personnel Management and Systems informed the complainant on behalf of the President of the Office that the latter had decided to reject both appeals for the reasons indicated by the Office in the course of the internal appeal proceedings and in accordance with the unanimous opinion of the Appeals Committee. That is the impugned decision.

B. The complainant contends that the impugned decision is illegal because it is based on "multiple false statements" which were not proved. He adds that he was not proved guilty, "before a competent, independent and impartial national tribunal", of any criminal offence prior to the President's decision, and that the EPO has not established before such a tribunal that dismissal is the legal penalty for any action committed by him, or that the refusal to grant him an expatriation allowance was legal. He also considers the impugned decision to be illegal because it does not apply German law, despite the fact that as a German national he is bound by that law.

Furthermore, he submits that he was not given sufficient details of the President's decision, which was conveyed to him by the Director of Personnel Management and Systems. In particular, he states that he was not informed of the exact date and wording of the decision, and that its authenticity was not established, for example by the signature of the President. He reiterates his objection to the fact that the Office's submissions before the Appeals Committee were drafted in French, and argues that internal appeals at the EPO are neither fair nor independent nor impartial, particularly because the President nominates at least two members of the Committee and is not bound by the Committee's opinion.

The complainant asks the Tribunal to hear numerous witnesses, including not only officials of the EPO but also various representatives of the German government and parliament. He presents 44 claims, the first of which is for the quashing of the impugned decision. The second is for the cancellation of Articles 106-113 of the Service Regulations concerning internal appeals. The remaining 42 claims cover various matters including, for example, a request for "[c]onfirmation that any illegal act of the EPO or an EPO official has to be prosecuted by the international prosecution authorities and/or criminal courts" (his 20th claim), and an order that, if certified translations of documents are required by the Tribunal, the EPO shall either certify the translations provided by him or provide its own certified translations (his 28th claim).

C. In its reply the Organisation submits that most of the complainant's claims (specifically Nos. 3-27 and 29-44) are irreceivable because they do not fall within the ambit of Article II of the Tribunal's Statute. With regard to his second claim, it points out that according to the case law the complainant cannot challenge the provisions of the Service Regulations *per se*, but only their application to him. As for the 28th claim, it states that he is entitled to seek the assistance of the Office's Language Service for translations relating to complaint procedures.

Regarding the rejection of his application for an expatriation allowance, the EPO states that in order to qualify for that allowance he would have had to have been permanently resident in a country other than Germany for at least ten years prior to his appointment. The Appeals Committee unanimously confirmed that, in view of his two periods of employment in Germany during the ten-year period at issue, he could not be considered as having been permanently resident abroad.

Concerning the decision to dismiss the complainant, the Organisation submits that Article 13(2) of the Service Regulations provides for dismissal before the end of a probationary period, and that the decision not to confirm a staff member's appointment is discretionary and subject to only limited review by the Tribunal. It emphasises that the complainant's final probationary report was based not only on his professional competence but also on his behaviour following receipt of his interim report, and it recalls that the Appeals Committee found that the Office had lawfully concluded that his work was "obviously inadequate".

As for the complainant's objection that the impugned decision was conveyed to him not by the President himself but by another official, who did not provide full details of the President's decision, the EPO recalls that the principle of delegation is accepted by the case law, provided that the organisation concerned can produce evidence of a delegation of powers. To that end, it produces two documents signed by the President on 26 October 2004, indicating that he had decided to dismiss the complainant's appeals. The Organisation adds that, according to the case law, when the executive head of an organisation accepts and adopts the recommendations of an internal appeal body he is under no obligation to give any further reasons than those given by the appeal body itself. It rejects his argument concerning the language of the proceedings, noting that his knowledge of French was rated "good" in his interim probationary report. Lastly, it observes that its employment relations with its staff are governed not by German law but by an independent system of law.

CONSIDERATIONS

1. The complainant was employed by the EPO in Munich from 1 October 2002 until he was dismissed on 21 May 2003 during his probationary period.
 2. On 27 October 2002 he requested payment of an expatriation allowance under Article 72(2) of the Service Regulations. His request was refused and, in January 2003, he lodged an internal appeal.
 3. The complainant was provided with an interim probationary report on 6 March 2003 in which his performance and behaviour were criticised. The complainant added a comment to the report, stating that it should be rejected "as in essential statements it [did] not correspond to the truth", and that "[d]etailed reasons [would] be submitted later on request". On 12 March a form containing a request for leave from 11 March to 4 April 2003 was found on the desk of the Formalities Officer of the Directorate in which the complainant worked. The complainant had not previously discussed the taking of leave either with that officer or with his trainer. He did not report for work on 11 March. His supervisor and an officer from the Personnel Department tried to contact him without success and on 13 March he was sent a written instruction to return to work. He did not do so. A written request for clarification of some of the notes he had made in his interim probationary report was also sent to him on 13 March.
 4. In early April the complainant forwarded five letters to the EPO making various claims and criticisms. However, he did not provide the clarifications requested on 13 March. On 11 April the complainant was informed that his claims could not be granted and he was again instructed to return to work. Again, he did not do so. On 24 April a final probationary report was provided to the complainant in which his immediate dismissal was recommended. The complainant added his comments on 9 May, stating, amongst other things, that the final report and the interim report were rejected. On 19 May he was informed that the President of the Office had decided to dismiss him with effect from 21 May 2003. Subsequently, he lodged a second internal appeal.
 5. The Appeals Committee considered the complainant's appeals separately and recommended, in October 2004, that both be dismissed. In both reports, the Committee noted that the complainant had objected to the Office providing its written comments in French and had claimed that it should provide a German translation. In both appeals, his objection was dismissed on the basis that, as an Examiner, the complainant was required to have a good knowledge of French and that, in his probationary report, his knowledge of that language had been assessed as "good".
 6. The complainant was informed by a letter dated 2 November 2004 that the President of the Office had decided to dismiss his appeals in accordance with the recommendations of the Appeals Committee. That is the impugned decision. The complainant seeks that that decision be set aside. Additionally, he seeks various forms of relief that are entirely extraneous to the impugned decision. A few examples will suffice:
 - "2. Cancellation of the internal appeals rules according to Article 106-113 statute of the EPO-officials.
 3. Prohibition of any act of the EPO or any EPO-official on the result of which the EPO or an EPO-official is economically dependent and/or from which the EPO or any EPO-official profits economically.
- [...]
20. Confirmation, that any illegal act of the EPO or an EPO-official has to be prosecuted by the international prosecution authorities and/or criminal courts.

[...]

38. It is claimed to forbid any representative of the [Federal Republic of Germany] who knowingly committed an illegal act against [the complainant], further public service in a national or international organ or organisation.”

Apart from the claim for cancellation of the President’s decision of 2 November 2004, the other claims are clearly irreceivable and must be dismissed.

7. Additionally, the complainant seeks to call various witnesses, including representatives of the government and parliament of the Federal Republic of Germany, members of the Administrative Council of the EPO and various EPO officials. The only question for this Tribunal is whether or not the decision to reject the complainant’s appeals and the earlier decisions giving rise to those appeals were attended by reviewable error. That is a question that can be determined on the pleadings and, thus, the application to call oral evidence is dismissed.

8. The complainant argues that the impugned decision was “illegal” because the President of the Office did not apply German law and, also, because he was not accorded the right to be heard before “a competent, independent and impartial national tribunal”. In support of the latter argument, he invokes the Universal Declaration of Human Rights and the European Convention on Human Rights. The complainant points to nothing in the terms of his appointment to suggest that German law, as distinct from the EPO Service Regulations, was applicable to any aspect of his employment or dismissal. Accordingly, his argument in that regard must be dismissed (see Judgments 1311 and 1369). So far as concerns the Universal Declaration of Human Rights and the European Convention on Human Rights, they apply, according to their terms, to Member States not to international organisations. Thus, the complainant’s argument that he should have been heard by, and that the matters alleged against him should have been proven in a national tribunal must also be dismissed.

9. It is also contended that the decision dismissing the complainant’s internal appeals should be set aside because “[EPO] internal appeals [...] are neither fair nor independent nor impartial”. The complainant specifies various aspects of the internal appeal procedure in support of that contention. However, he fails to mention that one aspect of that procedure is the right to lodge a complaint with this Tribunal, which is independent, impartial and competent to adjudicate upon his claims. Given that right, the complainant’s argument with respect to the internal appeals procedure must be dismissed.

10. The Tribunal hears and determines complaints alleging the non-observance of terms of appointment or the relevant Staff Regulations in accordance with Article II of its Statute. As pointed out in Judgment 493, “[i]n reaching its decision [the Tribunal] construes such texts by the accepted methods of legal interpretation [and] draws upon general principles of law in so far as they may apply to the international civil service”. Only the complainant’s arguments based on the EPO Service Regulations and those general legal principles are relevant to the present matter.

11. It is convenient first to consider the complainant’s argument to the effect that he was denied due process before the Appeals Committee because the Office’s submissions were written in French, which is one of the Office’s working languages. Apart from the evidence accepted by the Committee that the complainant had a good knowledge of the French language, it is to be noted that the Committee informed him that he could have the documents translated at his own cost and seek reimbursement, which would be granted if the Committee considered that a translation was necessary “for an appropriate legal defence”. The complainant chose not to take that course. Accordingly, his claim based on the lack of due process before the Appeals Committee must be rejected.

12. So far as the complainant contends that the decision dismissing his appeal with respect to the non-payment of an expatriation allowance otherwise involved reviewable error, nationals of the country in which they are employed by the EPO are entitled to that allowance if “at the time of taking up their duties [they] have been permanently resident for at least ten years in a country other than the country in which they will be serving, no account being taken of previous service in the administration of the latter country or with international organisations”. The complainant lived and worked in Germany for several months in 1993-94 and, again, in 1997-98. Accordingly, he was not permanently resident outside Germany for ten years prior to taking up his duties in October 2002. Nevertheless, he contended before the Appeals Committee that he was entitled to the expatriation allowance because “the focal point of [his] life” had not been in Germany. That argument is similar to that

considered and rejected by the Tribunal in Judgment 926. The test of “permanent residence” is a simple, objective test, as was stated in Judgments 1099 and 1150. As the complainant lived and worked in Germany, albeit for short periods, in the ten years preceding his appointment, he was not permanently resident in another country during that ten-year period. Accordingly and so far as the complaint is concerned with his entitlement to an expatriation allowance, it must be dismissed.

13. The complainant also contends that he was not provided with detailed information concerning the decision of the President to dismiss his appeals. In this respect, he claims he should have been provided with details of the exact date, the exact wording, the legal validity, the authorship of the President and the authenticity of the decision “for example by an original signature”. This argument must also be dismissed. The complainant was provided with the reports of the Appeals Committee and informed by registered letter, signed by the Director of Personnel Management and Systems, that the President had decided to reject his appeals “for the reasons indicated during the internal appeal proceedings and in accordance with the unanimous opinion of the Appeals Committee”. As the President was acting in accordance with the recommendations of the Committee, nothing further was required (see Judgment 2092). Further, it is noted that the EPO has produced the relevant decisions bearing the President’s signature as part of its pleadings. There can be no doubt that the decisions were made by the President and that the complainant was properly informed as to their content.

14. The only other argument advanced in the complaint is that the President’s decision should be set aside because it is “based on multiple false statements”. That argument is to be understood as relating to the complainant’s dismissal, as his entitlement to an expatriation allowance is, in the main, a question of the proper interpretation of Article 72(2) of the Service Regulations.

15. The thrust of the interim and final probationary reports was that the complainant’s work was not satisfactory. That was a matter for the personal judgement of those making those reports. So far as concerns the argument advanced by the complainant, the Tribunal will interfere with a judgement of that kind only if there was a material mistake of fact, some essential fact was overlooked, a clearly mistaken conclusion was drawn from the evidence or there was an abuse of authority. Although the complainant asserts “multiple false statements”, he points to no particular matter that would justify any view other than that taken by the Appeals Committee, namely, that “[i]t was perfectly lawful [...] to conclude, from the [complainant’s] overall performance and his behaviour after receiving [his] interim probation report, that his work was obviously inadequate”. That being so, and particularly in the light of his failure to return to work as instructed, it was well within the discretionary authority of the President to dismiss the complainant.

16. Lastly, the Tribunal sees no error in the approach of the Appeals Committee with respect to any of the matters advanced by the complainant.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 November 2006, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 7 February 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

