

110th Session

Judgment No. 2977

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L. S. against the European Patent Organisation (EPO) on 10 March 2009 and corrected on 27 March, the EPO's reply of 20 July, the complainant's rejoinder of 28 July and the Organisation's surrejoinder of 9 November 2009;

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, an Italian national born in 1972, joined the European Patent Office – the EPO's secretariat – on 1 November 2005 as an examiner in Directorate 1.2.68. His appointment was subject to an initial probationary period of 12 months. A first interim report on his probationary period was issued on 30 March 2006 in which the reporting officer, the Director of the above-mentioned Directorate, stated that the complainant was not progressing satisfactorily. He noted in particular that his productivity was below average. He stated that in the coming months the complainant would have a second tutor who would coach him on substantive matters. In the second interim

report, which was issued on 10 July, the reporting officer again noted that the complainant was not progressing satisfactorily, despite the fact that he had received help and guidance from two tutors and that he had enjoyed special conditions because of his shortcomings in German. The reporting officer indicated that if the situation did not “drastically improve” in the next months, he would not receive a satisfactory final report and no extension of the probationary period would be recommended. The complainant added his comments to that report on 25 July, acknowledging that his productivity was low but contending that this was due to communication problems with his second tutor.

The complainant’s final report on his probationary period was drawn up on 25 September 2006. The reporting officer recommended that his appointment should not be confirmed given that his productivity was far from satisfactory and that the quality of his work was below expectations. In his comments dated 4 October the complainant contested the report and asked that his appointment be confirmed or, subsidiarily, that his probationary period be extended preferably in a different directorate and with a different tutor.

By a letter of 18 October 2006 the President of the Office informed the complainant that he had considered the interim reports and the final report on his probationary period and that he had decided to dismiss him with effect from 1 November 2006. When the complainant was handed the letter on 18 October, he was instructed not to come to work for the remainder of his probationary period, but instead to take his remaining annual leave. He was asked to collect his personal belongings and he handed in his badge and keys that same day.

On 28 November 2006 the complainant appealed to the President of the Office challenging the decision of 18 October. He contended that he had not been given a proper opportunity to learn the job and demonstrate his abilities. He also alleged that the Administration had impaired his dignity in deciding to withdraw his privileged access to the premises on the day he was informed of his dismissal, that is to say before the dismissal actually took effect. He asked to be reinstated or,

subsidiarily, to be awarded financial compensation in an amount equivalent to at least two years' basic salary and allowances. He also sought moral damages and costs. The matter was referred to the Internal Appeals Committee on 25 January 2007.

In its report of 24 November 2008 the Committee held that the decision to dismiss the complainant was lawful and recommended rejecting the claim to be reinstated or to be awarded financial compensation. However, it noted that it had been unilaterally imposed on the complainant that he take his annual leave as from 18 October 2006, the day on which he was informed of his dismissal. Moreover, he had been given no reason for the decision to take away his badge on the spot. The Committee found that the Office's actions on the complainant's last working day were improper and recommended that he be granted moral damages in the amount of 5,000 euros for failure to respect his dignity and that his procedural costs be reimbursed.

By a letter of 24 January 2009 the Director of Regulations and Change Management notified the complainant that the new President, who had taken up her functions in July 2007, had decided to reject his request for reinstatement or for financial compensation, as well as his request for moral damages. Contrary to the Committee's opinion, the Office considered that there had been no fault in the way he had been treated on his last working day. The Director stated that if he had asked for additional time to finalise any arrangements on his last working day, it would have been allowed. However, in order to avoid further litigation, the President had decided to make an *ex gratia* payment of 2,500 euros in full and final settlement of the case. That is the impugned decision.

On 29 January 2009 the complainant asked the President to clarify and possibly reconsider her decision. He indicated that the offer to pay him 2,500 euros instead of the 5,000 euros recommended by the Internal Appeals Committee was not satisfactory and would not prevent him from lodging a complaint with the Tribunal. The Director of Regulations and Change Management informed the complainant on 10 March 2009 that the President had decided to endorse the Committee's recommendation and to grant him

5,000 euros; consequently, he would receive 2,500 euros in addition to the amount already paid to him.

B. The complainant alleges that the impugned decision is tainted with an error of law. The Internal Appeals Committee held that there was no evidence of lack of objectiveness in the assessment of his performance while noting that his relationship with one of his tutors was problematic. In his view, it cannot be concluded that suitable conditions for probation are met when a probationer and his tutor are not on good terms, and the Committee erred in law in failing to consider that element.

According to the complainant, the impugned decision is also ambiguous. In the first two paragraphs the Director of Regulations and Change Management refers to the President's decision and in the third paragraph he refers to the Office's position with respect to the claim for moral damages. Consequently, it is unclear whether the impugned decision was taken with due delegation of authority. In addition, the complainant submits that there was no objective reason to dismiss him in a "harsh way" and that he felt humiliated.

He asks the Tribunal to quash the impugned decision, to order his reinstatement or, subsidiarily, to award him "real damages" in an amount equivalent to at least two years' basic salary and benefits. He also claims moral damages in the amount of at least 10,000 euros plus costs.

C. In its reply the EPO explains that the decision whether or not to confirm the appointment of a probationer is discretionary. Moreover, the contested decision was taken in accordance with Article 13(2) of the Service Regulations for Permanent Employees of the Office, which provides that a probationer whose work has proven to be unsatisfactory shall be dismissed at the end of the probationary period. It adds that the decision was substantiated.

The defendant acknowledges that the complainant had personal difficulties with his second tutor but denies that he was deprived of the opportunity to prove his abilities on that account. It points out that his

first tutor, with whom he had a normal relationship, supported the assessment of his professional shortcomings. Moreover, the reporting officer for the probationary period was the complainant's Director and not his second tutor. It adds that the complainant was warned repeatedly, both orally and in writing, of his shortcomings and was given a chance to improve.

The Organisation asserts that the impugned decision was taken by the President who asked the Director of Regulations and Change Management to inform the complainant of her decision, as shown by the wording of the decision. It adds that the reference to the "Office" in the decision was a mere error in the choice of words.

In its view, the amount paid in moral damages, i.e. 5,000 euros, constituted an appropriate compensation for the circumstances accompanying the complainant's dismissal. The EPO stresses that there was no intention to show him disrespect and that it was thought to be in both parties' interest that the complainant should use his annual leave at the end of his probationary period. It submits that the claim for costs should be rejected because the complaint is unsubstantiated.

D. In his rejoinder the complainant contends that one of the documents produced by the EPO before the Tribunal shows that the Director of Regulations and Change Management drafted the impugned decision and submitted it to the President on 23 January 2009 for approval. He argues that the President was not given impartial advice and that it is therefore questionable whether the impugned decision was taken with knowledge of all material facts.

E. In its surrejoinder the Organisation maintains its position. It adds that, in accordance with Article 19(5) of the Rules of Procedure of the Internal Appeals Committee, the President received, together with the Committee's opinion, the entire appeal file with the exception of the witnesses' statements, minutes and tape recordings. Thus, she had a complete file at her disposal when she received the proposal from the Director of Regulations and Change Management.

CONSIDERATIONS

1. The complainant joined the EPO on 1 November 2005. His appointment was subject to an initial probationary period of 12 months. On 18 October 2006 he was informed that he was dismissed with effect from 1 November 2006 pursuant to Article 13(2) of the Service Regulations. At the same time, he was told that he should use up remaining leave days rather than work for the remainder of his contract. He was asked to collect his personal belongings, was escorted from the premises, and required to hand in his badge. The next day his e-mail access was cancelled. The complainant lodged an internal appeal seeking reinstatement or, alternatively, material damages in an amount equivalent to at least two years' basic salary and allowances, moral damages in the amount of 10,000 euros and costs.

2. The Internal Appeals Committee acknowledged that there had been personal difficulties between the complainant and one of his tutors during the second part of his probation. However, it concluded that there was no error involved in the dismissal decision and recommended that that part of the appeal be dismissed. It further recommended that the complainant be paid moral damages in the amount of 5,000 euros with respect to the circumstances in which he ceased work on 18 October 2006 and that his procedural costs be reimbursed.

3. After some equivocation, the complainant was, in fact, paid 5,000 euros by two payments of 2,500 euros, of which the first was said to be "*ex gratia*" and the other to be for moral damages. His appeal with respect to his dismissal was rejected. The complainant fully maintains the claims made in his internal appeal.

4. It is well settled that "the widest measure of discretion" attends decisions as to the confirmation or otherwise of probationary appointments (see Judgment 1386, under 17). Such decisions are subject to review only on the grounds that "there was a mistake of fact or law, or a formal or procedural flaw, or if some essential fact was

overlooked, or if a clearly mistaken conclusion was drawn from the evidence, or if there was abuse of authority” (see Judgment 1175, under 5).

5. The complainant contends that the difficulties that existed between him and his second tutor were overlooked and, for that reason, it was wrongly concluded that he had been given a fair chance to familiarise himself with the work required of him and to prove that he was adequate to the tasks involved. Although the Internal Appeals Committee did not examine in detail the personal difficulties between the complainant and his second tutor, it carefully reviewed the three probationary reports prepared by his Director in March, July and September 2006, the first having been prepared before the complainant was assigned a second tutor.

6. It was noted in the complainant’s first interim report of 30 March 2006 that satisfactory progress had not been made. That report was prepared in collaboration with his first tutor. It was also noted in that report that the complainant had difficulties in organising his work and managing his time. Targets were set for an improvement in his performance. Thereafter, the Director had regular meetings with the complainant and assigned an additional tutor to work with him. There was no immediate improvement and a further meeting took place on 23 June between the complainant’s Director, the Human Resources Manager and the complainant himself. The Director indicated at that meeting that, in his view, the complainant’s performance had deteriorated since the first probation report. In the same meeting, the complainant referred to the difficulties he was experiencing with his second tutor and asked that he be assigned another tutor for the rest of his probationary period. That request was refused. Instead, the Director made additional arrangements for the complainant to have intensive coaching. In a meeting with the Director of Personnel on 30 June 2006, the complainant again requested that he be assigned another tutor or, alternatively, that he be transferred to another directorate. The Director of Personnel explained that the complainant’s reporting officer was not biased against him and

that it would be difficult to make a proper assessment of his performance in the remaining period if he were transferred to another directorate.

7. It was noted in the second interim report of 10 July 2006 and the final report on the probationary period of 25 September 2006 that the complainant was not progressing satisfactorily, notwithstanding efforts by his Director to assist him. The complainant challenged both reports, referring, amongst other things, to the difficult relationship between him and his second tutor.

8. Given that the complainant frequently made reference to the difficult relationship between him and his second tutor, it is impossible to conclude that this was overlooked, either when it was decided to dismiss him or, subsequently, in his internal appeal. It is important to note that even before the complainant was assigned a second tutor, it had been noted that his performance was unsatisfactory. The Director's conclusion in subsequent reports that satisfactory progress was not being made was endorsed by the complainant's countersigning officer, as well as by both his tutors. Although there were difficulties in the relationship with his second tutor, it is clear that several strategies were employed by the complainant's Director in an attempt to provide him with assistance and that, this notwithstanding, there was no significant improvement in his performance which had been assessed as inadequate from the beginning. Given this, the conclusion that the complainant had been given a fair opportunity to prove his ability was not manifestly wrong. Accordingly, the dismissal decision must stand.

9. The argument that the complainant is entitled to an additional sum by way of moral damages is made on the basis that the actions taken on the day that the complainant was informed of his dismissal were clearly humiliating, were taken deliberately and that, at various stages, the EPO denied any wrongdoing, including at the time it proffered 2,500 euros by way of *ex gratia* payment. These are matters that are relevant to the award of moral damages. However, the award

of 5,000 euros was not inadequate. The complainant has received that amount, even though part of it was initially described as an *ex gratia* payment. That being so, the Tribunal will not award moral damages beyond what has already been paid.

10. The complainant also questions whether decisions taken with respect to his internal appeal were properly taken. There is no evidence to suggest that they were not. And in the absence of evidence of that kind, it is to be presumed that they were.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 November 2010, Ms Mary G. Gaudron, 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 2 February 2011.

Mary G. Gaudron
Giuseppe Barbagallo
Dolores M. Hansen
Catherine Comtet