

B. (No. 4)

v.

EPO

126th Session

Judgment No. 4043

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr I. B. against the European Patent Organisation (EPO) on 5 September 2016 and corrected on 1 December 2016, the EPO's reply of 13 March 2017, corrected on 12 April, the complainant's rejoinder of 18 July, corrected on 2 August, the EPO's surrejoinder of 9 October, the complainant's further submissions of 14 December 2017 and the EPO's final comments thereon of 17 January 2018;

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 dismiss him for misconduct.

At the material time the complainant was the Chairman of the Executive Committee of the Munich Section of the Staff Union of the European Patent Office (SUEPO Committee Munich). In July 2014, he was elected as a full member of the Central Staff Committee (CSC).

In June 2015 Mr C., a staff member who had been involved in internal proceedings against the EPO, informed the Administration that members of SUEPO Committee Munich were putting pressure on him to continue his case before the Tribunal to seek reimbursement of costs.

He provided the Administration with an agreement that he had signed in 2012 with the complainant, acting as Chairman of the SUEPO Committee Munich (the 2012 agreement). The agreement, which incorporated a standard agreement entitled “Rules for the Grant of Legal Assistance by SUEPO” (the general agreement), provided that SUEPO would cover the costs incurred in legal proceedings initiated by Mr C. against the EPO but that if, at any time, he breached any part of the agreement including the rules contained in the general agreement, SUEPO could withdraw its financial support. The general agreement relevantly provided that the staff member “shall at all times entrust the whole procedure to the lawyer, either directly or through SUEPO’s Legal Advisor” “shall at no time communicate directly with the Office on matters concerning the litigation without the prior and express approval of the external lawyer or the [SUEPO] Legal Advisor”. It further provided that “[w]here the legal proceedings end with a judgment for the Applicant and costs are awarded, the Applicant shall reimburse the Committee either (i) the total costs incurred by SUEPO, or (ii) the remainder of the award of costs after the Applicant’s own costs [...] have been deducted, whichever is the smaller”. The 2012 agreement also similarly provided that “[i]n the event of successful action and the award of costs, the Applicant shall reimburse the Committee [...]”.

By a letter of 2 November 2015 the complainant was informed that the EPO considered that the general agreement could be considered void, at least partially, as it unduly limited the exercise of the staff member’s rights. The complainant was charged with having breached the highest standards of integrity expected of him under Article 5(1) of the Service Regulations by encouraging staff members to sign an unlawful agreement. He was also accused of having actively incited the Treasurer of SUEPO Committee Munich (Ms W.) to unduly pressure Mr C. by threatening him with a lawsuit if he did not continue litigation against the EPO before the Tribunal. He was invited to comment on these charges. It was also indicated that that letter could not be disclosed to any third parties. On 12 November the complainant denied these allegations. The complainant forwarded the letter of 2 November 2015 to SUEPO Committee Munich, which published it on the SUEPO

website, partially redacted, and also forwarded it to the Chairman of the Administrative Council.

On 17 November the complainant was informed that the Administration had decided to refer the case to the Disciplinary Committee for an opinion and that he was suspended from service with immediate effect pursuant to Article 95(1) of the Service Regulations for permanent employees of the European Patent Office. On 23 November the complainant was informed that the oral hearings would take place on 17 and 18 December.

In the context of an internal investigation involving another staff member, Mr P.C., the Administration discovered that the complainant had provided the latter with an internal confidential document of the Local Advisory Committee (LAC) on the installation of security equipment at the Munich site of the Office. On 1 December the complainant received “further submissions” filed by the Administration detailing two new charges of serious misconduct (disclosure of confidential information) and asked for his comments, which the complainant submitted on 3 and 16 December. Oral hearings were held on 17 and 18 December 2015.

In its reasoned opinion dated 18 December 2015 a majority of the Disciplinary Committee found that the charges relating to the signing of an unlawful agreement were unfounded, because the 2012 agreement only contained a qualified restriction on the employer/employee relationship, while a minority considered that the restriction was unlawful. A majority also found that there was insufficient evidence of the complainant’s active involvement in the exercise of undue pressure on Mr C. However, the Disciplinary Committee unanimously found that the complainant had disclosed confidential information by disclosing the letter of 2 November 2015. It also unanimously found that the disclosure to another staff member of a document addressed to the members of the LAC of which the complainant was a member concerning the installation of security equipment at the Munich site of the Office could not be considered as disclosure of confidential information. It unanimously recommended to impose on him the disciplinary sanction of downgrading.

By a letter of 15 January 2016 the President of the Office informed the complainant that he had decided to dismiss him with immediate effect under Article 93(2)(f) of the Service Regulations for the clear, severe and repeated breaches of Articles 5, 14(1) and 20 of the Service Regulations. The complainant would nevertheless receive compensation in lieu of notice. In view of the nature of the misconduct, he was banned from entering the EPO premises without prior authorization.

On 11 April 2016 the complainant requested that the decision of 15 January be reviewed. His request was rejected on 10 June 2016. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to reinstate him with full retroactive effect from 15 January 2016. He seeks material, moral and exemplary damages, with interest on all sums awarded. He also claims costs for the internal appeal and the proceedings before the Tribunal. Lastly, he requests the production of various documents.

The EPO submits that the complaint is partially irreceivable and otherwise unfounded. It considers that the complainant's request for the production of documents is likewise unfounded.

In his further submissions of 14 December 2017 the complainant contests the veracity and accuracy of the written transcript of the hearings before the Disciplinary Committee and asks the Tribunal to order the EPO to produce the audio recordings.

In its final comments the EPO submits that the latter request is unfounded.

CONSIDERATIONS

1. The complainant was a member of the staff of the EPO. During the period in which the events occurred central to this complaint, the complainant was initially the Chairman of the SUEPO Committee Munich, then a member of the Committee and finally a full member of the Central Staff Committee.

2. In late 2015, the complainant was the subject of disciplinary proceedings before a Disciplinary Committee resulting in a decision of the President in a letter of 15 January 2016 to impose the disciplinary sanction of dismissal. A request for a review was unsuccessful, culminating in a decision of the President of 10 June 2016 to reject the request as unfounded. This is the decision impugned in these proceedings.

3. The conduct of another staff member involving some of the same facts was the subject of separate disciplinary proceedings against that staff member and the imposition of a disciplinary measure. That matter is the subject of another judgment (Judgment 4042) delivered in public at the same time as this judgment. Indeed some of the commentary in this judgment is, where appropriate, a repetition of the commentary in that judgment.

4. In broad outline, the circumstances surrounding the allegations of misconduct were as follows. Another EPO staff member, Mr C., signed an agreement in September 2012 (the 2012 agreement). Generally, the subject matter of the agreement was the provision by SUEPO of funding for legal assistance to Mr C. in pursuing a grievance against the EPO. The agreement was in two parts. The first part was specific to the circumstances of Mr C. The second, incorporated into the first, set out the “Rules for the Grant of Legal Assistance by SUEPO” (“the general agreement”). The signatories to the 2012 agreement were Mr C. and the complainant, identified as the Chairman of the SUEPO Committee Munich. In terms, the agreement was not with SUEPO but was with the “Committee of the Staff Union of the European Patent Office in Munich” but, for present purposes, it is helpful for reasons of economy of language to treat SUEPO as one of the two contracting parties.

5. The signing of the agreement was the conduct founding the first of four charges of misconduct against the complainant that led to his dismissal.

6. In 2015, Mr C. was still involved in pursuing his grievance against the EPO funded by SUEPO. In June and July 2015, Ms W., the Treasurer of the SUEPO Committee Munich, contacted Mr C. both in writing and in person. Her conduct was the subject of Judgment 4042, referred to earlier. This contact was viewed by the EPO as applying undue pressure on Mr C. in relation to his litigation against the EPO. The EPO viewed the complainant's conduct in relation to this contact with Mr C. as inciting Ms W. to exercise undue pressure in order to prevent a settlement between the EPO and Mr C.

7. The alleged incitement of Ms W. was the conduct founding the second of the four charges that led to the complainant's dismissal.

8. On 2 November 2015, the Principal Director Human Resources wrote to the complainant. The letter was in several parts. The first part, under the heading "Facts", involved, in substance, a comparatively detailed legal analysis of, it appears, both the individual funding agreement as exemplified by the 2012 agreement together with the general agreement. After that analysis, the letter opined that the agreement "may be considered as void, at least partially". The letter then noted that by signing the agreement, the complainant was "asking and encouraging staff members to sign unlawful agreements, which infringe the general interests of justice as well as their fundamental rights and seems to be a breach of the highest standards of integrity expected". The letter went on to say that the complainant's conduct may, in effect, constitute misconduct which could result in a disciplinary sanction and the complainant was invited to "state [his] case in writing" within a specified time. The letter was marked, at the top, "Personal/Confidential". The letter concluded with a paragraph: "For the sake of clarity, it is noted that the present communication cannot be published, communicated or disclosed to any third parties (with the exception of a legal adviser for the purpose of defence)."

9. The complainant disclosed the letter to SUEPO. Additionally, it was forwarded as an attachment to a letter of 11 November 2015 from SUEPO to the Chairman of the Administrative Council. It was published

on the SUEPO website on 16 November 2015. The complainant took no steps to ensure that the letter was deleted from the website. This conduct founded the third of the four charges against the complainant, namely that he had breached his obligation of confidentiality towards the EPO.

10. The fourth charge concerned the disclosure by the complainant to another staff member of internal documents containing alleged confidential and sensitive information relating to the installation of safety and security features and equipment, including cameras, at the Munich site of the EPO. The complainant had access to these documents as a member of the Munich LAC.

11. In the pleas in the proceedings before the Tribunal the complainant raises, and the EPO contests, a range of arguments seeking to impugn the decision of 10 June 2016. In his brief, the complainant advances four legal arguments. The first is that the impugned decision is unlawful per se as the acts in question leading to the charges against the complainant did not constitute misconduct. The second is that the impugned decision is unlawful as the disciplinary proceedings were tainted with procedural irregularities and violated the complainant's right to a fair trial. The third is that the disciplinary sanction imposed on the complainant resulted from the application of an improper standard of proof coupled with a repetition of the argument that the acts in question did not constitute misconduct let alone serious misconduct. The result was that the original decision imposing the disciplinary sanction was wholly disproportionate. The fourth and final argument is that the impugned decision was taken as a retaliatory measure directed against the complainant as a staff representative.

12. The contentions concerning the second charge can be dealt with briefly. It involved an allegation that the complainant incited another staff member, Ms W., to exercise undue pressure on yet another staff member, Mr C. The Tribunal concluded in Judgment 4042 that the conduct of Ms W. did not constitute the exercise or application of undue pressure on Mr C. The case against the complainant did not involve an allegation that the inciting was to do anything other than what in fact

was done. If, as is the case, what was done did not constitute the application of undue pressure, then whatever conduct the complainant may have engaged in which might be viewed as incitement, could not involve inciting Ms W. to apply undue pressure. Accordingly, the conduct complained of did not and could not constitute misconduct.

13. Similarly the contentions concerning the first charge can be dealt with comparatively briefly. It is desirable to discuss the 2012 agreement (including the general agreement) and whether signing it, as the complainant did, constituted misconduct. In the material before the Tribunal there are competing expert opinions about whether the 2012 agreement is contrary to German law, one provided by the EPO (indicating that parts of the agreement are unlawful) and the other provided by the complainant (according to which the agreement in its entirety is lawful). It is unnecessary for the Tribunal to address in detail these competing views. It is sufficient to note that the question of whether the agreement or parts of it are lawful is plainly contestable. Ordinarily an international organisation would have no legitimate interest in the lawfulness or otherwise of an agreement between a staff association and its members. As the Tribunal said in Judgment 3106, consideration 7, the principle of freedom of association “precludes interference by an organisation in the affairs of its staff union or the organs of its staff union (see Judgment 2100, under 15). A staff union must be free to conduct its own affairs, to regulate its own activities and, also, to regulate the conduct of its members in relation to those affairs and activities.” This is all the more so if the agreement concerns the funding of legal advice in the pursuit by staff members of grievances against the international organisation. Whether the agreement was lawful or not would be a matter for the parties to the agreement, namely the staff association and the member concerned. The question of lawfulness would only arise if the legal efficacy of the agreement was contested by one of the parties. There is nothing to suggest that either the complainant or Mr C. had any reservations about the legality of the agreement when it was signed and plainly Mr C. was to derive a benefit under it. Moreover, as a matter of principle, there is nothing untoward about a staff association providing funding to a member of the association

employed by an international organisation to obtain legal assistance to pursue a grievance against the organisation.

By signing the 2012 agreement, the complainant did not engage in misconduct let alone serious misconduct.

14. The preceding analysis should not be viewed as tacit acceptance by the Tribunal that litigation by members of staff against the organisation that employs them is desirable or should be promoted. If grievances can be resolved other than by litigation involving lawyers, that is very much to be preferred (see, for example, the observations of the Tribunal in Judgment 3900, consideration 11, and the cases referred to therein).

15. This leads to a consideration of the third charge involving an allegation of breach of confidentiality. The allegation was based on what the complainant did with the letter of 2 November 2015 discussed in considerations 8 and 9 above.

16. The complainant argues he has not breached the principle of confidentiality. In its opinion of 18 December 2015 the Disciplinary Committee said, in relation to the third charge, the complainant had failed to comply with his duties under the Service Regulations and, specifically, under Article 20 of the Service Regulations.

17. Article 20 has two elements. The second is irrelevant, relating as it does to confidentiality of “matter[s] dealing with the work of the Organisation”. The first element requires a permanent employee to: “[...] exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of or in connection with the performance of his duties; [the permanent employee] shall not in any manner whatsoever use or disclose to any unauthorised person any document or information not already made public”. It may be doubted that this provision is intended to do anything more than prevent public disclosure of facts or documents revealed to the staff member while working at the EPO. However, assuming the provision is cast more widely it did not prevent the disclosure made by the complainant.

That is to say, the complainant was not under a duty not to do what in fact he did.

18. The mere fact that the sender of a letter or other communication states that the communication is confidential does not, of itself and irrespective of the contents of the communication, result in an obligation for the recipient to keep that communication confidential. In his pleas, the complainant does not dispute he forwarded the letter to SUEPO, but he did so to inform SUEPO and to obtain instructions from it. SUEPO then published the letter to its members by, it appears, publication on its website. That the complainant forwarded the letter to SUEPO is unexceptionable conduct. Much of the letter of 2 November 2015 was a critique of the general agreement arguing that the agreement was “void, at least partially”. This conclusion was based on detailed reference to specific provisions of German law. Plainly enough the complainant was entitled to share the letter with others in SUEPO, as a general critique of the lawfulness of the general agreement. It is well settled that staff representatives must enjoy a broad freedom of speech (Judgment 3156, consideration 12) and it was not unlawful for the complainant, in the circumstances of this case, to disseminate the letter of 2 November 2015 as he admitted doing.

19. Article 20 did not create an obligation on the complainant to take steps to ensure the deletion of the letter from the website. As a general proposition, a provision of a staff rule or regulation founding a charge of misconduct should not be widely or liberally construed so as to capture conduct potentially at the very margins of the conduct proscribed by the rule or regulation. It should be construed only to capture conduct clearly within the boundaries of the rule or regulation. The posting of the letter on the website was a result of the conduct of others. For the preceding reasons, the imposition of a disciplinary sanction on the complainant referable to the third charge was not legally based.

20. The facts founding the fourth charge can be summarised briefly. They are not disputed by the complainant. On 4 December 2013, another member of staff of the EPO, Mr P.C., asked the complainant to provide

him with information about the installation of safety features and equipment including video cameras and other physical security information tools at the premises of the EPO Office in Munich. Within hours the complainant sent Mr P.C. an internal draft document intended to be discussed by the LAC on 13 December 2013. The complainant had received this document as a member of the LAC. The document outlined new security concepts for the Munich site with maps of the premises with the planned security installation.

21. The Disciplinary Committee concluded, unanimously in its opinion of 18 December 2015 that the disclosure of this document did not constitute the disclosure of confidential information, as alleged by the EPO. It considered the document could not be classified as confidential and should be seen as public information. Its reasoning was that the LAC followed the rules of procedure of the General Advisory Committee (GAC) and that those express procedural rules provided that documents of the GAC be saved on an electronic database accessible to all employees unless the GAC excluded the documents from inspection. While acknowledging that the LAC did not have a dedicated intranet site, the Disciplinary Committee concluded that “in analogy to the GAC documents, once distributed to the LAC members, LAC documents are considered to be public if not labelled explicitly as confidential”.

22. In the initial decision to dismiss the complainant in his letter of 15 January 2016, the President rejected this reasoning. His rejection contained five elements. The first element was that the LAC and the GAC were separate bodies, differently composed and that the latter had “no competence” over the former. The second element was that there had been no decision of the Munich LAC or its Chairman adopting the GAC Rules of procedure. The third element was that, in any event, the GAC disclosure regime contemplated material being uploaded to an electronic database and there was no such database for the LAC. The fourth element was that there had been no publication authorised by the LAC, its Chairman, or the author of the document in order for the information to be considered public information. The fifth element was that the complainant sent the document before any discussion of it by

the LAC and without obtaining the authorisation of the LAC for the action he took.

23. This reasoning of the President was mainly repeated in the impugned decision of 10 June 2016. It is, in substance, repeated in the EPO's pleas in these proceedings.

24. But the real issue is whether the document, which was not marked confidential, was obviously inherently confidential or should have been viewed this way by the complainant. In his brief the complainant makes the point that documents are circulated to members of the LAC before it meets in order for the LAC members to consult with the membership of SUEPO to ascertain their views so as to be able to represent those views to the meeting of the LAC. The complainant appears to accept that it may be otherwise if the document provided to the members of the LAC was marked confidential. In its reply and surrejoinder the EPO does not provide any cogent response to this analysis beyond saying that the confidentiality obligations under the Service Regulations (particularly Article 20) "are clearly based on the concept that all documents or information are confidential both externally and internally unless otherwise provided or already published". This argument really begs the question of what documents or information are confidential and what are not. The EPO does not point to any particular information in the document that would indicate it should have been treated as confidential. The Tribunal is not satisfied that the document disclosed by the complainant was of a character that required that it not be disclosed. Accordingly the EPO erred in treating the complainant's conduct as misconduct.

25. For the foregoing reasons no disciplinary sanction should have been imposed on the complainant including the sanction of dismissal. The decisions of the President of 15 January 2016 and 10 June 2016 to dismiss the complainant and affirm his dismissal will be set aside. An order will be made reinstating the complainant with all legal consequences. The complainant must give credit for any earnings from professional employment during the period between 15 January 2016

and the date of his reinstatement, which shall be deducted from the amounts due. Interest will accrue at the rate of 5 per cent per annum on the resulting remuneration arrears from due dates until the date of payment. The complainant is entitled to moral damages and an order for costs which the Tribunal assesses in the sum of 30,000 euros and 8,000 euros respectively. Exemplary damages, as sought by the complainant, are not warranted.

26. It is unnecessary to address the other bases on which the complainant impugns the decision to dismiss him. The complainant sought an oral hearing but the Tribunal is satisfied that it can fairly and appropriately determine the case on the written material provided by the parties. It is also unnecessary to address subsidiary procedural issues including the accuracy of the transcript of the hearings prepared by the EPO and the status of an affidavit relied on by the complainant.

DECISION

For the above reasons,

1. The decisions of the President of 15 January 2016 and 10 June 2016 to dismiss the complainant and affirm his dismissal are set aside.
2. The EPO shall reinstate the complainant to the position he held immediately before his dismissal with all legal consequences. Any earnings from professional employment during the period between 15 January 2016 and the date of his reinstatement shall be deducted from the amounts due.
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 moral damages in the sum of 30,000 euros.
5. The EPO shall pay the complainant costs in the sum of 8,000 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

YVES KREINS

DRAŽEN PETROVIĆ