

The Administrative Tribunal,

Considering the complaint filed by Mr P. G. against the European Patent Organisation (EPO) on 31 March 2006 and corrected on 10 May, the EPO's reply of 16 August and the letter of 28 August 2006 from the complainant's counsel informing the Registrar of the Tribunal that the complainant did not wish to submit a rejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a Swiss national born in 1970, joined the European Patent Office – the EPO's secretariat – in April 2002 as an examiner at grade A2. In an interim report on his probationary period signed by his tutor on 29 August 2002, it was noted that he was progressing satisfactorily. He was then assigned a different tutor for the second half of his probationary period. On 13 January 2003 he asked his director if his working hours could be changed for family reasons. She rejected his request the following day and stated that since his attitude towards work and his productivity needed improvement, an extension of his probationary period could not be excluded.

On 20 February 2003 the complainant's tutor signed a further probation report in which he recommended that the probationary period be extended because the complainant was not progressing satisfactorily. This report was countersigned by his director on 3 March and by the principal director on 7 March. The complainant signed it on 12 March without adding any comments. The following day the Personnel Administration Department informed him that the President of the Office had decided to endorse his tutor's recommendation; his probationary period was consequently extended by six months.

On 15 May the complainant met with his tutor and his director who told him that his work was not progressing satisfactorily. Four days later, the complainant wrote to his director commenting on the meeting and noting that although he had gone through some personal difficulties, they had not affected his work. He expressed his willingness to improve and indicated that he was happy to be in his director's department. A final probation report was signed on 24 June by his tutor who held that the complainant's performance remained inadequate and consequently recommended that his appointment should not be confirmed. The director, who countersigned the report the following day, added that the complainant's employment should be terminated as soon as possible. The complainant wrote to the President of the Office on 29 June claiming antipathy on the part of his tutor and that an independent assessment of his work would certainly be positive. On the same day he filed a first internal appeal challenging his "unjustified immediate dismissal", and requesting inter alia that his dismissal be set aside and that his probationary period continue.

By a letter dated 12 August 2003 the Directorate of Conditions of Employment and Statutory Bodies informed the complainant that the President had decided to dismiss him as from 30 September 2003. The complainant challenged that decision by lodging a second appeal on 28 August. Meanwhile, the Directorate of Employment Law informed him, by a letter of 26 August, that the President had found that the decision to dismiss him was justified and therefore had decided to reject his request of 29 June; the matter was subsequently referred to the Internal Appeals Committee. The complainant was notified on 30 September that his appeals of 29 June and 28 August 2003 would be examined jointly in view of the causal link between his probation report and his dismissal.

In its opinion of 4 November 2005 the Appeals Committee recommended, by a majority, that the appeal be dismissed as unfounded and that, exceptionally, on the grounds of equity, the complainant's procedural costs be refunded because the circumstances of his dismissal needed clarification, which had been obtained during the internal appeal proceedings in particular by hearing witnesses. It held that the decision to terminate employment at the end of the probationary period was a discretionary decision subject to only limited review and found neither procedural flaw nor abuse of discretion in the assessment of the complainant's performance or in the President's

decision to dismiss him.

By a letter dated 5 January 2006 the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to endorse the recommendations of the majority of the Appeals Committee. That is the impugned decision.

B. The complainant submits that since the President's decision to dismiss him is based on his second and final probation reports, which are both "null and void", it should be quashed. He asserts that he was not given a chance to comment on these reports before his tutor, director and principal director signed them. Moreover, his final probation report was drafted only three months after the decision to extend his probationary period by six months was taken, which shows that his probationary period was extended only on "a pro forma basis" and that he had no real chance to improve.

He contends that, in breach of the official practice, the Office refused to transfer him to another directorate. He points out that members of the Staff Committee suggested that he be transferred to another directorate and that another director agreed to accept him but the transfer never took place. The Office also refused to assign him a new tutor for the third part of his probationary period, despite the fact that his working relationship with his director was strained and that his two last probation reports differed from the first one. It therefore breached the duty of care it owes him.

The complainant alleges that his director was not able to assess his performance objectively since she was influenced by personal reasons. In this respect he points out that in December 2002 she had instructed him to "monitor" other employees of the directorate and, in particular, to gather information on their work and behaviour. Having refused to do so, he "fell out of favour with [her]". Moreover, she wrongly assumed that he was the author of an anonymous e-mail discrediting her. The complainant also points out that, in January 2003, his director refused to accede to his request for modification of his working hours for family reasons, a request which is usually granted. In addition, he alleges that his second tutor also lacked the necessary objectivity to assess his performance since he was bound by the director's instructions. He adds that his tutor had insufficient time to provide a reliable appraisal of his work, given that he was in charge of three trainees and that he was on holiday from November 2002 to mid-January 2003. In support of his allegations, he produces an affidavit from another examiner showing that the quality of his work was acceptable.

Concerning the internal appeal proceedings, the complainant alleges that the EPO denied him the right to a fair hearing and failed to respect his dignity and his right to privacy, in particular because documents related to his internal complaint were disclosed to witnesses – i.e. the complainant's tutor and director – who, according to him, were not party to the internal proceedings. Moreover, they had the possibility of modifying and harmonising their statements in the light of the comments he had made. This is, in his view, a "blatant procedural error". Furthermore, his director, having read his internal complaint, brought an action for libel against the complainant's counsel before a German court, thereby exerting improper influence on the internal proceedings. He also criticises the Appeals Committee for failing to examine the circumstances surrounding the sending of the anonymous e-mail discrediting his director. According to him, such a "formal procedural error" justifies his claim for reinstatement because the outcome of the internal proceedings could have been different if the content and authorship of the e-mail had been disclosed.

The complainant asks the Tribunal to quash his final probation report, the decision to terminate his contract of employment and the impugned decision of 5 January 2006. He also requests that the Tribunal order the Organisation to reinstate him as from 1 October 2003, without a probationary period, and pay him the salary arrears due since that date. In addition, he claims at least 20,000 euros in compensation for pain and suffering, as well as compensation for "any other material and non-material damage [...] he suffered as a result of the dispute over and beyond the date of the last oral hearing", and costs.

C. Citing the Tribunal's case law, the EPO contends in its reply that the decision to terminate employment at the end of the probationary period is a discretionary decision, which is subject to only limited review.

Concerning the probation reports, it states that the complainant was given the opportunity to comment in writing on his reports in accordance with Article 13(2) of the Service Regulations for Permanent Employees of the European Patent Office. It explains that the complainant signed his second probation report on 12 March 2003 without making any comments. Moreover, his tutor held a meeting with him on 18 February 2003 even though for

probation reports, unlike for regular performance appraisals governed by the General Guidelines on Reporting, there is no obligation to do so. Referring to the Tribunal's case law, the defendant also opines that an extended probationary period of three months was sufficient to assess the complainant's suitability for the post. It indicates that in a meeting held on 15 May 2003 the complainant was told by his tutor and his director the areas in which improvement was needed. It denies that the outcome of the extended probationary period was a foregone conclusion.

The defendant rejects the complainant's assertion that there is an official practice of assigning a third tutor to a probationer during the extended probationary period or allowing transfer during that same period. It points out that, according to Article 13(2) of the Service Regulations, the decision to extend the probationary period is a decision that the President of the Office may take in exceptional cases, which means that it falls under his discretionary authority. Relying on the Tribunal's case law, it adds that a transfer might be a solution when the suitability of the probationer is undoubted, but this was not the complainant's case. Indeed, his performance did not significantly improve during the extended probationary period.

With regard to the fact that the complainant's submissions to the Appeals Committee were forwarded by the Office to the complainant's director and tutor, it refers to the Committee's conclusion that it is important to strike a balance between the complainant's right to confidential and fair proceedings and the Office's right to establish the facts as fully as possible. It adds that the complainant's tutor and director were familiar with the circumstances relating to his dismissal. It therefore shares the Committee's view that the Office neither infringed the complainant's rights in the appeals proceedings nor adversely affected his defence. The Organisation further submits that there was no need for the Committee to obtain the anonymous e-mail in order to decide whether it had played a role in the complainant's dismissal, particularly because the Committee had heard witnesses who had indicated that it was not clear from this e-mail who was the sender.

Contrary to the complainant's assertions, the defendant considers that the complainant's second and final probation reports both gave an objective assessment of his performance. It emphasises that the complainant signed the second report without making any comments; if he felt that his report did not give an accurate picture of his performance he should have mentioned it at that time. It denies that the decision of the complainant's director was motivated by personal reasons and that the tutor, being her subordinate, was not free with regard to the complainant's appraisal. His director addressed the issue of the anonymous e-mail during a meeting held in May 2003 and then considered the matter to be closed. Moreover, she rightly refused to accede to his request for modified working hours, since the complainant proposed to miss not only coffee breaks but also lunch breaks, which are necessary to restore fitness for work.

Regarding the alleged lack of objectivity on the part of the complainant's tutor, the EPO acknowledges that the latter was absent between November 2002 and mid-January 2003, but points out that the complainant too was absent for 16 days during that period. It takes the view that the affidavit produced by the complainant contains no cogent argument against the accuracy of the tutor's assessment, and notes that the author of the affidavit worked in a different technical area than the complainant. It further denies that the complainant's tutor was overburdened and explains that trainers are allocated time for training purposes and are released from their normal duties during that time.

CONSIDERATIONS

1. The complainant joined the European Patent Office as an examiner in April 2002. In accordance with the Service Regulations he was placed on probation for one year. In an interim report on his probationary period dated 29 August his tutor indicated that he was proceeding satisfactorily. He was then assigned a different tutor for the second half of his probationary period. In a further probation report, dated 20 February 2003, the tutor indicated that the complainant's work was unsatisfactory and recommended that his probationary period be extended; that report was countersigned by the complainant's director and the principal director in March 2003. The complainant's probationary period was consequently extended by six months. In a final probation report, dated 24 June 2003, his tutor stated that the complainant's performance had not improved and therefore recommended his dismissal. The President of the Office decided to dismiss the complainant with effect from 30 September 2003. The matter was subsequently referred to the Appeals Committee.

2. On 4 November 2005 the Committee, with five members in the majority and two members dissenting,

recommended that the complainant's appeal be dismissed but that he should be awarded procedural costs. The majority found that the complainant had been treated fairly, that the assessment of his performance had been objective and correct and that there was insufficient evidence to substantiate his allegations of lack of objectivity. The minority considered that the complainant had not been treated fairly in that not all the options and possibilities had been explored and that he had not been treated the same as a colleague for whom an alternate solution was found. The minority also took the view that there was evidence of clear tensions and problems in the complainant's directorate.

3. By a letter of 5 January 2006 the complainant was informed of the President's decision endorsing the majority's recommendations. He challenges the President's decision to uphold his dismissal as well as his final probation report.

4. The complainant puts forward a number of pleas concerning the lack of objectivity and neutrality on the part of those who evaluated his performance; the failure to assign a new tutor and transfer him to another directorate; and the legality of the dismissal itself. He also alleges procedural errors regarding the admissibility of the testimonies of his director and his tutor before the Appeals Committee; the signing of his probation reports prior to his having had an opportunity to comment; and the lack of investigation concerning the source of the e-mail discrediting his director.

5. Before considering the specific arguments, the Tribunal recalls that the reason for probation is to enable an organisation to assess the probationer's suitability for a position. For this reason, it has recognised that a high degree of deference ought to be accorded to an organisation's exercise of its discretion regarding decisions concerning probationary matters including the confirmation of appointment, the extensions of a probationary term, and the identification of its own interests and requirements. The Tribunal stated in Judgment 1418, under 6, that a discretionary decision of this kind will only be set aside "if taken without authority or in breach of a rule of form or of procedure, or if based on a mistake of fact or of law, or if some essential fact was overlooked, or if clearly mistaken conclusions were drawn from the facts, or if there was abuse of authority". It also reaffirmed that "where the reason for refusal of confirmation is unsatisfactory performance, [it] will not replace the organisation's assessment with its own".

6. The complainant submits that the whole appraisal process was flawed because those responsible for the assessment, his director and his tutor, lacked the requisite objectivity and neutrality.

He refers to certain incidents and the statements of witnesses in support of his assertion that there was great tension between his director and himself. He also asserts that he was deemed to be the author of the anonymous e-mail discrediting his director and for this reason he could not get an objective appraisal.

With regard to his tutor, the complainant submits that he was duty bound to follow the instructions of his director, he was overburdened, and had not spent enough time with him to do a proper appraisal. Relying on a statement in the minority opinion of the Appeals Committee, he submits that his tutor also lacked the necessary flexibility in his assessments. As to the second and final probation reports drafted by his tutor, the complainant contends that these appraisals do not accurately reflect his work. He takes the view that his work was complete and any changes made by his tutor were negligible and irrelevant.

Lastly, the complainant alleges that he was not treated fairly by EPO officials, such as the Principal Director of Personnel, because their minds were influenced by his director.

7. While the Tribunal finds that many of the inferences the complainant seeks to draw are not supported by the record, it is evident that there were tensions between him and his director. The record, however, does not support his assertion that he was "deemed" to be the author of the anonymous e-mail. It is true that the complainant was considered to be a suspect, in part, because he was in the directorate where it was thought the e-mail had originated, but after he had told the Principal Director of Personnel that he was not the author of the e-mail the matter was considered to be closed. It should also be added that there is simply no evidence to support any inference that his director influenced EPO officials in their views of the complainant or his work.

8. Regarding the allegations concerning the complainant's tutor, although the tutor talked about other individuals under his tutelage during the relevant time, it was in the context of a comparison of their work with that of the complainant. In the absence of any evidence regarding the usual number of trainees a tutor would have, the

inference drawn by the complainant is without foundation. The Tribunal also rejects the submission that the tutor worked with the complainant for an insufficient amount of time to formulate an objective appraisal. Certainly in the latter part of 2002 and early 2003 the tutor was absent from the office for extended periods of time. However, when regard is had to the total amount of time he was the complainant's tutor, it cannot be concluded that the tutor was not exposed to a sufficient amount of the complainant's work to formulate a proper appraisal.

9. With respect to the tutor's appraisal having been influenced by his director, this is no more than a bald assertion without any factual foundation. In its dissenting opinion, the minority considered that the tutor had such strong convictions regarding the correctness of his methods that he might not be an individual with sufficient flexibility to reconsider the judgement he had formed in the complainant's case. The Tribunal observes that an expression of opinion is not evidence of the existence of a fact. It also finds the assertion to be irrelevant since there does not appear to have been a request made to the complainant's tutor to reconsider his evaluation.

10. While the existence of tensions may give rise to questions concerning the objectivity and neutrality of an assessor, in the present case, the complainant has failed to demonstrate that the existence of tensions was linked in some way to the poor performance appraisals. In fact, the appraisals were conducted by an individual with whom there is no evidence of tension or poor relations. The complainant's director played no part in the formulation of the appraisals and only countersigned them after they had been prepared by the complainant's tutor.

11. The complainant states that despite his requests and those of Staff Committee members he was never transferred to another directorate nor was he assigned a new tutor. He contends that transfers and the assignment of a new tutor for every six months of probation are both standard practices of the Organisation. The complainant relies on Circular No. 246, Part A(6) and on the principle that the Organisation has a duty of care and supervision toward its staff members. He also relies on the "principle of reasonableness" and on Judgment 396 for the proposition that as a general rule thought should be given to a transfer before dismissal.

Moreover, he argues that given the e-mail incident attributed to him by his director and the obvious resulting mistrust, he should have been transferred to another directorate and assigned a new tutor. He contends that dismissal should have been a last resort and that he was not given an opportunity to improve.

12. While the complainant points to the fact that another probationer was given a transfer, this fact alone is insufficient to demonstrate that the Office has an "official" or "standard" practice regarding transfers. As well, the complainant has not demonstrated that assigning a new tutor every six months, and in particular during an extended period of probation, is standard practice. In the circumstances of the case and in the light of the Tribunal's reasoning below there is no need to consider the content of Circular No. 246 any further.

13. As to the case law, the complainant relies on Judgment 396 in support of his assertion that he should have been transferred prior to being dismissed. The issue in that case was whether the head of the Organisation had correctly applied a particular provision of the Staff Regulations authorising him to terminate the appointment of a probationer at any time in the Organisation's interests. The Tribunal stated that "[a]s a rule, before a [probationer] is dismissed thought should be given to transferring him to some other post on trial, especially if he is junior in rank". It must, however, be noted that this was said in the context of a misunderstanding between the probationer and his supervisor and the Tribunal's observation that such a misunderstanding does not necessarily justify instant dismissal. In the present case, the stated reason for the dismissal was poor performance.

14. To conclude that in situations of poor performance a staff member on probation will always be entitled to a transfer prior to being dismissed undermines the whole purpose of probationary terms. In some circumstances a transfer may be the proper option, but the circumstances of the present case do not warrant this finding.

15. The complainant submits that the Committee erred in ruling that the evidence of his director and his tutor was admissible. He also alleges that his confidential submissions should not have been transmitted to them because this permitted them to adapt and harmonise their testimony. In addition this constituted a breach of his privacy.

16. The Tribunal is unable to find any evidence of adapting or harmonising the testimonies as alleged by the complainant. Given that the submissions contained a number of allegations concerning these two officials, had they not been provided with these submissions, they would not have had an opportunity to address the issues raised. Regarding the privacy concern, this is addressed in the Service Regulations by the requirement that members of the Committee are bound to secrecy.

17. The complainant also takes issue with the fact that his second and final probation reports were signed by his tutor and countersigned by his director and the principal director before he had an opportunity to comment on them. In addition to this proving his fate was predetermined, he submits that he was deprived of the opportunity to be heard. He argues that this is contrary to the general principle that the purpose of a probation report is to encourage dialogue between a probationer and his/her supervisors, as stated in Judgment 2172.

18. Although one of the purposes of a probation report is to encourage dialogue, this does not equate to an obligation regarding the timing or the form of the dialogue. In the case of Judgment 2172, the Organisation's instructions relating to evaluation reports required that a probationer be given an opportunity to comment before the appraisal report was countersigned. In the present case there are no similar instructions.

19. With respect to the right to be heard, quite apart from the timing of when the report is signed or countersigned, the Organisation's procedure gives the probationer an opportunity to comment on the appraisal and the superior must respond to the comments. In the present case, this did occur with the final report and could have also occurred with the previous reports had the complainant chosen to comment.

20. Lastly, the complainant contends that since the situation would have been different if the author of the anonymous e-mail had been identified, the failure to conduct an investigation to determine who was the author constitutes a procedural error. Quite apart from the fact that there is no evidence before the Tribunal as to whether the type of investigation suggested could identify the author of the e-mail, the underlying assumption of a different outcome is based on speculation and ignores the negative appraisals.

21. In light of the Tribunal's findings that the process leading to the complainant's dismissal was neither procedurally nor substantively flawed, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 4 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Dolores M. Hansen

Catherine Comtet