

The Administrative Tribunal,

Considering the complaint filed by Mr K.-S. J. against the European Patent Organisation (EPO) on 10 May 2001 and corrected on 16 August, the EPO's reply of 31 October, the complainant's rejoinder of 3 December 2001, and the Organisation's surrejoinder of 30 January 2002;

Considering Articles II, paragraph 5, and VII 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 was born in 1970 and has British and German nationality. On 1 November 1998 he joined the staff of the European Patent Office, the EPO's secretariat, as an examiner at grade A1. He had to do a probationary period of one year in Directorate-General 1 (DG1) before his appointment could be confirmed.

In an interim report drawn up on 26 March 1999 his director expressed doubts about the complainant's progress. Similar doubts were expressed in the second interim report which was issued on 29 June. In a final report, dated 16 September, his director recommended that the complainant's appointment should not be confirmed. His director died shortly before the complainant lodged this complaint with the Tribunal in May 2001. In comments dated 29 September 1999 the complainant contested the assessment of his performance stating that it was tainted by prejudice.

By a letter dated 18 October 1999, sent by registered mail, the Director of Personnel in DG1 informed the complainant that on account of his unsatisfactory performance his appointment would be terminated on 31 October 1999, in accordance with the terms of Article 13(2) of the Service Regulations. The complainant, who took leave from 26 to 29 October, collected the letter from the post office on 1 November 1999. On 5 November he wrote to the President of the Office requesting confirmation of his appointment on the grounds that he received the letter notifying him of his dismissal after his probationary period had expired. The President replied on 23 November 1999 stating that all reasonable measures had been taken to notify the complainant in good time of the decision to dismiss him; he confirmed that the decision would stand.

On 26 January 2000 the complainant appealed to the President against the decision of 18 October 1999. His letter was received by the Administration on 31 January 2000. The matter was referred to the Appeals Committee, which, in a report of 12 December 2000, recommended not allowing the appeal. In a letter of 14 February 2001 the President endorsed the Committee's opinion and rejected the appeal. The complainant impugns that decision.

B. The complainant has four pleas. He submits, first, that the notice of dismissal was given out of time and for that reason was invalid. Under Article 13 of the Service Regulations such notice had to be served "at the end of" the probationary period rather than "after the end". The burden is on the Organisation to meet such deadlines.

Secondly, he says there was prejudice against him on the grounds of his sexual orientation. He believes that homophobic prejudice motivated his director's judgment of his performance. In the light of Judgment 1376, the Organisation has an obligation to take allegations of harassment seriously; and although that judgment concerned heterosexual harassment, the standards expressed by the Tribunal must apply equally to other cases of sexual prejudice. He submits that the Organisation has failed, and is still failing, in its legal obligations under Judgment 1376.

Thirdly, he takes issue with the fact that the Organisation failed to establish a personal file on him in a proper and

timely manner.

Lastly, he finds fault on several counts with the approach taken by the Appeals Committee. For instance, it did not give sufficient weight to the procedural errors that he alleged. He also finds it odd that the Committee should accept the evidence that homophobic remarks were made and yet pass over the fact that the Organisation has a legal obligation to take measures to protect its staff.

He wants the Tribunal to quash "the decision that notice of dismissal was given on time" and rule that the notice given was invalid. He also wants it to rule that the EPO "has failed in its duty under [Judgment 1376]"; that it failed in its duty to maintain a personal file on him in a proper and timely manner; and that the Appeals Committee "took too restrictive a view of its functions and responsibilities". He claims material and moral damages, and costs.

C. In its reply the Organisation contests the receivability of the complaint on the ground that the complainant's internal appeal, which challenged a decision validly notified to him on 19 October 1999, was time-barred. It maintains that the notice of dismissal was delivered in time. However, the complainant behaved in such a way as to avoid taking receipt of the letter of dismissal until after the probationary period had expired. The EPO did all it could to arrange delivery and the complainant had the opportunity to collect the letter before going on leave. He ignored the notice of delivery left by the postman on 19 October. A copy was conveyed to him by courier while he was on leave, but his partner refused to take delivery.

Late delivery of notice of dismissal cannot, however, have the effect of confirming a probationer's employment. The purpose of Article 13(2) of the Service Regulations is to ensure that unsuccessful probationers do receive timely notification of the non-confirmation of their appointment.

The Organisation insists that the complainant was dismissed for professional unsuitability, and that according to the Tribunal's case law a decision not to confirm a probationer's appointment is discretionary. He was dismissed for valid reasons. He was warned in time about shortcomings in his performance, but failed to deliver the minimum standard expected. It denies that the assessment of his performance was tainted with bias against homosexuals, and finds the complainant's allegation in this regard unsubstantiated. Indeed that argument was raised for the first time on 29 September 1999. The highly critical interim reports had meanwhile gone unchallenged.

The Organisation shares the view of the Appeals Committee which found that the lack of a personal file had no bearing on the lawfulness of the reports which led to his dismissal. As for the Committee's treatment of his case, it scrutinised aspects of the appeal in proportion to the bearing they had on his case. The Organisation holds that there are no grounds for his claim to damages.

D. In his rejoinder the complainant states that the Organisation has not proved that he avoided taking receipt of the notice of dismissal. The Appeals Committee assessed his evidence and found that his internal appeal was filed in time. Furthermore, it was not evident to him that he would be dismissed without prior discussion, as representations were under way on his behalf, and there was a proposal that his probationary period be extended.

If his accusations were put forward at a relatively late stage it was because allegations of homophobia are not easily made or proved and even if there are suspicions, evidence is needed. He is not saying that the EPO as an institution discriminates against its staff, but only that some of its officers appear to do so.

E. In its surrejoinder the Organisation takes up the complainant's argument that he was expecting to be contacted personally. It submits that the Service Regulations do not provide for the "prior discussion" that he refers to.

CONSIDERATIONS

1. In this complaint, brought against the EPO, the complainant impugns the decision of the President of the European Patent Office, endorsing the unanimous opinion of the Appeals Committee, to reject his appeal against his dismissal at the end of his period of probation.
2. The complainant seeks an order quashing the President's decision that notice of dismissal was given in a timely manner at the end of the probationary period and asks the Tribunal to rule that such notice was therefore invalid. He also wants the Tribunal to determine that the EPO has failed, and is still failing, in its duty under

Judgment 1376, to correct unacceptable discriminatory practices; that it failed in its duty to properly maintain his personal file in a timely manner; and that, in view of the facts of the case, the Appeals Committee took too restrictive a view of its functions and responsibilities and, consequently, failed to consider in a proper manner the arguments and specific claims raised by the complainant in his appeal. Lastly, he seeks material and moral damages for loss of employment and for the serious breach of the EPO's obligations towards him, as well as the costs of the internal appeal and of this complaint.

3. The complainant joined the EPO on 1 November 1998. He had to do a one-year probation period. Two interim reports on his progress were issued in March and June 1999 respectively. Both were highly critical of his performance and could leave no doubt that the probationary period would be a failure if substantial improvement was not made. A final report was drawn up on 16 September 1999. In that report the complainant's director, his reporting officer, found that the complainant "... had not shown that he possessed the qualities needed to undertake, either in the short or long term, the duties of an examiner, nor had he shown that he could develop them in the future. That being the case, it was not possible to recommend confirming his appointment." This conclusion was based on the two previous interim reports. The final report contained other detailed and critical observations.

4. By a letter dated 18 October 1999, the Director of Personnel in DG1 informed the complainant that, on account of his unsatisfactory performance during the probationary period, he was dismissed with effect from 31 October 1999 pursuant to Article 13(2) of the Service Regulations. The dismissal letter was posted on 18 October 1999 by registered mail with advice of delivery. On 26 October the Administration enquired with the post office to see if the letter had been delivered. It was told that the letter had been delivered to the complainant's home on 19 October, but that, in his absence, the postman had left a notice of delivery in the complainant's letterbox indicating that he could collect the letter from the post office as from the next day, 20 October. The Administration then decided to send a duplicate of the letter to the complainant's home by courier on 27 October. The complainant was on leave from 26 to 29 October; in his absence, his partner living in the flat refused to take delivery of the envelope. The courier therefore left it in the complainant's letterbox. After returning from leave, the complainant collected the dismissal letter from the post office on 1 November 1999.

5. On 5 November, in a letter to the President of the Office, the complainant requested confirmation of his appointment, on the grounds that he received the letter of dismissal after his probationary period had expired, i.e. after 31 October 1999. The President replied on 23 November, and confirmed the complainant's dismissal. He stated that the letter of 18 October 1999 could have been collected from the post office as from 20 October, and also mentioned that, by going away without leaving an address, the complainant had, by his own behaviour, prevented the Office from handing the letter over in time.

6. The complainant lodged an internal appeal by means of a letter dated 26 January 2000 which was received by the Administration only on 31 January 2000. Following a recommendation by the Appeals Committee that the appeal be dismissed the President of the Office did so; that is the impugned decision.

7. The Organisation argues that the present complaint is irreceivable because the internal appeal itself was not timely brought within three months from the notification of the impugned decision to the complainant. That argument in turn raises the question of when the complainant can be said to have been notified by the letter dated 18 October 1999 of the decision to dismiss him.

8. That question came before the Appeals Committee in two different contexts, regarding first whether the appeal was receivable and secondly whether the complainant was timely terminated before the end of his probationary period. The Committee gave two different and inconsistent answers on the matter. On the receivability of the internal appeal it said:

"23. Given the known facts, it cannot be assumed that the letter was validly delivered on 27 October 1999, when the postman put it in the appellant's letter-box. Normally, this would indeed mean that it was then in the appellant's possession. But on that date the appellant - as personnel department should have known - was on (approved) leave. The appellant's failure to leave a forwarding address [as required by the guidelines on leave] is neither here nor there ...

24. A more valid question is whether the registered letter with advice of delivery can be said to have been validly delivered before 1 November 1999. Certainly the appellant had the opportunity to collect the letter from the post office before going on leave (on 26 October 1999).

The appellant errs in citing Article 108(3) [of the Service Regulations]. That provision says the period for appeal starts at the latest on the date on which the appellant becomes aware of the contested decision. It may begin earlier with the decision's publication, display, or - relevant here - 'notification', ie communication in writing within the meaning of Article 106(1)...

The appellant also errs in saying that his dismissal should have been handed to him in person, and that personnel department had no good reason for not doing so. Under Article 32(3) ... such communications may also be sent 'by registered letter', and personnel department is free to take that course where deemed appropriate.

25. However, the letter cannot be deemed delivered until the addressee can reasonably be expected to have become aware of it. The [Committee] is loth to assume, to the appellant's detriment, that this was the case before 1 November 1999.

Addressees of registered letters are under no general obligation to collect them straight away. The post office holds them for a period indicated to the addressee. If the letter is collected - as in the present case - the date on which this occurs will normally be regarded as the date of delivery. Under the circumstances of this case (approved leave, pressure of work towards the end of the probationary period, limited post-office opening hours), the appellant cannot be considered in breach of his obligations because he did not collect the letter until after returning from leave.

26. It follows from the above that it must be assumed, to the appellant's benefit, that he was not notified of his dismissal until 1 November 1999. His appeal, received by DG 1's personnel department on 31 January 2000, was therefore filed in time."

9. On the other hand, when dealing with the date on which the complainant was notified of the termination of his employment, the Appeals Committee said:

"28. The appellant argues that because he was not validly notified of dismissal until 1 November 1999 (ie the day after his probationary period had expired) his appointment should be confirmed under Article 13(5) [of the Service Regulations]. ... however, that is neither the necessary consequence of the provision as worded nor reconcilable with its intention and purpose.

Article 13(5) ... reads: 'At the end of the probationary period, the appointment of a probationer who has not been dismissed ... under the terms of this Article shall be confirmed'. Under Article 13(2) a probationer whose work has not proved adequate 'shall be dismissed at the end of the probationary period'... Its wording, intention and purpose thus exclude dismissal after the end of the probationary period; dismissal should occur as of the end of that period and take effect when it expires. The idea is to end the probationer's employment at the same time as his probationary period, and to prevent dismissal from being decided on once that period has ended. It is designed to protect staff on probation: at the end of that period, they should be in no doubt whether their employment is to continue.

Given this *ratio legis*, and the rather vague wording used, the present notice of dismissal - which was posted before the end of the probationary period, although for reasons the appellant must answer for it did not become effective until the day after it expired - is to be regarded as having been issued 'at the end of the probationary period'.

Nor incidentally, given the principles of good faith which apply in civil-service employment, can the appellant claim the protection of this provision if he thwarts timely notification of dismissal by waiting until the probationary period is over before collecting it, having been informed about it by the post office in good time (ie before the end of that period)."

The Tribunal notes that the file amply supports the conclusions drawn in this latter passage that the complainant "must answer for" the non-receipt of the letter before 1 November 1999 and that it was his own actions which resulted in delivery being "thwart[ed]".

10. There are other circumstances, not mentioned by the Appeals Committee, which strengthen these conclusions and lead strongly to the inference that the complainant was deliberately avoiding taking delivery of the letter of 18 October until 1 November 1999. The final report on his probationary period, received only a few weeks previously,

left no room whatever for any doubt that he would not be offered permanent employment

at the end of his probation. Furthermore, the fact that the complainant did not take the duplicate copy of the letter from his letterbox or collect the original at the post office until 1 November - the day after the expiry of his probation - but then wrote a letter almost immediately to the President of the Office requesting confirmation of his permanent appointment, indicates strongly that he was dishonestly attempting to manipulate the rules to his own advantage. The refusal of the complainant's partner to accept delivery of a letter addressed to a person with whom he shared living quarters and the complainant's own failure to give the notification, required by the guidelines on leave, of his temporary address while on leave are also significant.

11. The requirement of good faith dealings is a two-way street. While staff members are under no obligation to assist the Administration in any actions the latter may wish to take against them, they do have a duty not to so conduct themselves as to deliberately frustrate normal dealings with their employer. The latter is entitled to assume that the employees will receive and accept written communications sent to them in the normal course of affairs.

12. It is not in the interests of either the staff member or the Organisation that the latter should feel obliged to hire professional process servers or bailiffs in order to ensure that official notifications that are sent out are duly received.

13. The complainant clearly had ample opportunity to collect the first letter from the post office before going on leave on 26 October. The Tribunal thus concludes that the letter of 18 October 1999 should be deemed to have been notified to the complainant on the day when it should, in the normal course of business, have been picked up by him, which on the evidence is no later than Monday, 25 October. While it may be true, as the Appeals Committee observed, that the addressee of a registered letter is under no obligation to collect it straight away, a deliberate failure to do so cannot be invoked by the complainant to his advantage.

14. The fact that the complainant, by his own conduct, only took possession of the letter and became aware of his dismissal on 1 November 1999 cannot prevent the EPO from having given him valid notice of dismissal.

15. It follows that his internal appeal, lodged on 31 January 2000 was not filed within three months of receiving notice of the decision which it sought to attack, as required by Article 108(2) of the Service Regulations and was therefore irreceivable. Thus the complainant has not exhausted his internal means of redress and the complaint to the Tribunal is likewise irreceivable.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

Seydou Ba

James K. Hugessen

Catherine Comtet

