D. (No. 5)

v.

EPO

127th Session **Judgment No. 4114**

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr A. D. against the European Patent Organisation (EPO) on 18 May 2016 and corrected on 9 August 2016, the EPO's reply of 15 May 2017, the complainant's rejoinder of 31 August and the EPO's surrejoinder of 18 December 2017;

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 downgrade him for serious misconduct.

At the material time the complainant was an employee of the European Patent Office – the secretariat of the EPO – who held grade G13. On 10 November 2015 he was informed that, on the basis of a report established in accordance with Article 100 of the Service Regulations for permanent employees of the Office, the Principal Director of Human Resources had initiated a disciplinary procedure against him and had requested the Disciplinary Committee to issue a reasoned opinion recommending an appropriate sanction. The Administration indicated in the report that the complainant had breached his obligation not to be absent from work from 6 to 27 March 2015 when he had undertaken a

cure (violation of Articles 55 and 63 of the Service Regulations), his obligation to ensure that his absence was duly and precisely notified, authorised and recorded (violation of Articles 62 and 63 of the Service Regulations and Rule 13 of Circular No. 22) as well as his specific obligations under the provisions governing annual and sick leave, and his general obligation to act with efficiency and integrity and with the Office's interests in mind (violation of Articles 5 and 14 of the Service Regulations). The Administration stated that it could not be established with absolute certainty that, for the totality of the misconduct of which he was accused, the complainant had acted knowingly and wilfully. In addition to his unauthorised absence, the Administration noted that he had had performance problems since at least 2008. The Administration asked the Disciplinary Committee to assess the performance-related incidents of 2015 as an additional element of misconduct. The Administration considered that an appropriate sanction would be downgrading by one grade.

The Disciplinary Committee issued its reasoned opinion on 24 February 2016. It found that the complainant had breached his professional obligations by being absent without authorisation and that he had committed misconduct by intentionally showing an unacceptable low level of performance and unwillingness to improve during 2015. It therefore recommended downgrading him by two grades.

By a letter of 8 April 2016, the President of the Office notified the complainant that his behaviour amounted to serious misconduct violating the standards of integrity and conduct required of an international civil servant under Article 5(1) of the Service Regulations, as well as his obligations to be present at work, to perform his tasks and to conduct himself solely with the interests of the Office in mind as provided in Article 14(1) of the Service Regulations. He considered that the complainant's misconduct was aggravated by his grade and seniority. He also noted that the complainant had already been reprimanded in 2014 for breach of the rules governing the registration of strike action, leading to another incident of unauthorised absence. Hence, he had decided to follow the recommendation of the Disciplinary Committee. Accordingly, the complainant's grade would be G11/05 as from 1 April 2016.

The President added that the complainant could file a request for review of that decision in accordance with Article 109 of the Service Regulations. That is the decision the complainant impugns before the Tribunal.

The complainant asks the Tribunal to set aside the impugned decision of 8 April 2016, to declare the disciplinary procedure "null and void" and to "reassign [him to] grade G13/05 with effect from 1 April 2016". He also seeks compensation for the financial damages corresponding to the downgrading to grade G11/05, and an award of moral damages. Lastly, he asks the Tribunal to award him costs.

The EPO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal means of redress. It otherwise asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. At relevant times, the complainant was a member of the staff of the EPO. Between 6 March 2015 and 27 March 2015, he was absent from work. That absence and other matters came to be considered by the Disciplinary Committee, which issued a reasoned opinion on 24 February 2016 following the initiation of a disciplinary procedure based on a report issued under Article 100 of the Service Regulations in November 2015. The Disciplinary Committee recommended the downgrading of the complainant by two grades. By letter dated 8 April 2016 the President of the Office wrote to the complainant saying he accepted this recommendation and, accordingly, downgraded the complainant effective 1 April 2016. The complainant sought a review of this decision but, in addition, filed a complaint with the Tribunal challenging it. This complaint is his fifth complaint. By letter of 13 July 2016 the request for review was rejected by the President as unfounded in its entirety. The complainant sought to impugn that decision in a complaint filed in the Tribunal on 11 October 2016, which is his ninth complaint.

2. The EPO seeks the joinder of this and the ninth complaint in order that one judgment could be rendered. The complainant opposes joinder. The EPO argues, correctly, that the fifth complaint is irreceivable.

The Tribunal will explain why this is so shortly. The two complaints do not involve the same or similar questions of fact or law, ordinarily the touchstone for joinder. That is because the factual issues actually raised in this complaint are extremely narrow in compass (and concern receivability only) and, as it turns out, so are the legal issues extremely narrow in compass (whether the complaint is receivable). Joinder and the rendering of one judgment facilitates consistent fact-finding and legal analysis in cases where there are the same or similar facts and the same or similar legal issues. As will be seen in due course, no such commonality of fact-finding and legal analysis arises in this case.

3. The fifth complaint is irreceivable because the complainant had not, at the time of its filing, exhausted internal means of redress. The complainant argues that he had, because Article 110(2)(c) of the Service Regulations says, in relation to certain specified decisions, they are excluded from the internal appeal procedure, including "decisions taken after consultation of the Disciplinary Committee". However the Tribunal has held in Judgment 3888, consideration 9, that Article 110 of the Service Regulations does not absolve a complainant from the need to seek a review to satisfy the Tribunal's jurisdictional threshold that a complainant must have exhausted internal means of redress. The complaint must be dismissed as irreceivable.

It is unnecessary to hold an oral hearing as requested by the complainant. The written material provided by the parties has been sufficient to enable the Tribunal to resolve this complaint without such a hearing.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 29 October 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ