

L. (No. 6)

v.

EPO

134th Session

Judgment No. 4565

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixth complaint filed by Ms D. L. against the European Patent Organisation (EPO) on 7 June 2018, the EPO's reply of 12 September 2018, the complainant's rejoinder of 6 January 2019 and the EPO's surrejoinder of 17 April 2019;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision to impose on her the disciplinary sanction of downgrading for having engaged in gainful employment while on non-active status without prior authorisation.

Facts relevant to this case are to be found in Judgment 3969, delivered in public on 24 January 2018, on the complainant's first complaint. Suffice it to recall that the complainant, who at the material time was a permanent employee of the European Patent Office (the EPO's secretariat), was placed on "non-active status" due to invalidity in August 2011. In 2013 the Office initiated disciplinary proceedings against her, based on a charge that she had been gainfully employed outside the Office without prior authorisation whilst on non-active status. In the course of its investigation, the Office decided to withhold

payment of part of her invalidity allowance. In the report that it submitted to the Disciplinary Committee, the Office took the view that the complainant's misconduct was serious enough to warrant dismissal. The Disciplinary Committee, however, whilst accepting that the complainant's actions constituted misconduct, considered that there were mitigating circumstances, including the incorrect advice she had received from her lawyer and a lack of clarity in the applicable provisions. It also found that the complainant had acted in good faith. It therefore recommended a less severe disciplinary measure, namely downgrading from grade A3, step 8, to grade A2, step 8.

In his final decision the President of the Office disagreed with the Disciplinary Committee's finding that the complainant had acted in good faith, and he maintained that her conduct could justify a stricter sanction than that recommended by the Committee. Nevertheless, he decided to endorse the Committee's recommendation and the complainant was therefore downgraded to grade A2, step 8. He also accepted the Committee's recommendation that the withholding of part of her invalidity allowance should cease and that the sums withheld should be reimbursed.

That decision, which was the subject of the complainant's first complaint, was set aside by the Tribunal in Judgment 3969. The Tribunal considered that the President had not adequately explained why he rejected the Disciplinary Committee's finding that the complainant had acted in good faith, and had not adequately motivated his ultimate conclusion on the disciplinary sanction he imposed, with specific reference to the various mitigating circumstances identified by the Committee. The matter was remitted to the EPO for a new decision by the President and the complainant was awarded moral damages and costs.

By a letter of 16 March 2018 the President notified the complainant of his new decision on the case. Having reconsidered the report of the Disciplinary Committee, the President accepted the Committee's finding that the complainant had acted in good faith. However, he recalled that the Committee had also unanimously concluded that, by engaging in unauthorised gainful employment in 2013, and by advertising her services as a psychotherapist as from 2012, the complainant had breached

Articles 5(1), 14(2) and 16(1) of the Service Regulations for permanent employees of the European Patent Office. He pointed out that in Judgment 3969 the Tribunal had confirmed that the complainant was obliged to seek permission for her activity. The President therefore decided to endorse the Committee's recommendation to downgrade her to grade A2, step 8, with effect from 1 May 2014. He did not modify his earlier decision concerning the reimbursement of sums withheld from her invalidity allowance. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the President to take a new decision taking into account the Tribunal's findings in Judgment 3969, particularly in consideration 16 thereof. She requests that her downgrading to grade A2, step 8, be cancelled and that the EPO be ordered to compensate her for the loss of salary and benefits by reimbursing the difference between the amounts paid to her since 1 May 2014 and those she would have received since that date had she not been downgraded, with interest at the rate of 5 per cent per annum. She also claims moral damages and costs.

The EPO asks the Tribunal to dismiss the complaint as unfounded on the merits.

CONSIDERATIONS

1. The complainant in the proceedings leading to Judgment 3969 is the complainant in these proceedings. In that judgment, the Tribunal remitted a matter to the EPO having set aside a decision of the President of the Office of 9 July 2014 effectively affirming an earlier decision of the President of 7 April 2014 imposing a disciplinary measure on the complainant. She challenges in these proceedings a decision of the President of 16 March 2018 again imposing a disciplinary measure. The 2014 decisions to impose a disciplinary measure followed a written opinion provided by the Disciplinary Committee in March 2014. The 2018 decision impugned in these proceedings was again made by reference to, and against the background of, the March 2014 written opinion of the Disciplinary Committee. That more recent decision involved an acceptance of the conclusion of the Committee that the

complainant had acted in good faith, unlike the 2014 decisions of the President which were premised on a conclusion that the complainant had acted in bad faith.

2. Much of the relevant background is set out in Judgment 3969. In summary, the complainant, having commenced employment as a psychologist with the EPO in 2003, was placed on non-active status due to invalidity in August 2011. A question arose about her right to engage in work while receiving an invalidity allowance and her obligations to notify the EPO of her doing so. In fact, as recounted by the Disciplinary Committee, the complainant advertised as a provider of psychotherapist services in mid-2012 and undertook her first consultation in December 2012. In the first half of 2013, the complainant had eleven further consultations with patients. The complainant had not sought approval for this conduct though a lawyer acting on her behalf had, in March 2012, sought clarification of the meaning of an expression (“non-occasional employment”) in the Implementing Rules to Article 62a of the Service Regulations. The expression was thought to have a bearing on the complainant’s rights and obligations concerning work while receiving an invalidity allowance. In March 2013, the complainant made a request to the EPO to undertake work which was likely to become something more than occasional. In April 2013 an investigation was commenced into an alleged breach of the Service Regulations.

3. The investigation and subsequent administrative activity led to the consideration of the matter by the Disciplinary Committee. It concluded that the complainant had engaged in misconduct by accepting payment for professional services from January to March 2013 without seeking approval, by accepting payment after March 2013 while approval was still pending, and by publicly advertising psychotherapy services without seeking approval and providing those services between December 2012 and June 2013. The Committee, in its written opinion, then addressed what it viewed as aggravating circumstances and also mitigating circumstances. The Committee then set out its findings. It found that the complainant was not in gainful employment and thus did not breach various specified provisions of the Service Regulations and related

normative legal documents. However, it did find that the complainant, in breach of the Service Regulations, failed to notify the EPO of her intentions to work as a psychotherapist before she advertised and in so doing failed to act with integrity and thus put the dignity of her office at risk. It also found the complainant, in breach of the Service Regulations, accepted payment for her services without having received the EPO's explicit approval. The Committee then discussed proportionality and the appropriate disciplinary sanction. It rejected the EPO's contention that dismissal was the appropriate sanction. It recommended downgrading the complainant to grade A2, step 8, from her then current grade of grade A3, step 8.

4. In the impugned decision of the President of 16 March 2018, he endorsed the conclusion of the Committee on the question of disciplinary sanction, namely the downgrading recommended, though reflecting a new career structure adopted in December 2014. However, the President did maintain one element of the decision of 9 July 2014 set aside by the Tribunal in the earlier proceedings, namely to terminate the reduction of her invalidity allowance and reimburse to the complainant the part withheld until April 2014.

5. The complainant challenges two elements of the impugned decision. One is her downgrading and the other concerns the decision relating to the reduction of the invalidity allowance. Insofar as the downgrading is concerned, the complainant contends the President failed to take into account mitigating circumstances as, so she contends, was required by the observations of the Tribunal in consideration 16 of Judgment 3969. No mitigating circumstances are identified in the pleas. This is a bare assertion and nothing more need be said. She also contends in her rejoinder that the EPO provided vague and incomplete information misleading her lawyer, effectively raising this as a mitigating factor. The obligations of an executive head of an organisation depend on whether she or he is following and adopting the conclusions and recommendations of an internal appeal or review body or rejecting them and, at least potentially, making a different decision. The observations in consideration 16 concerned the latter situation where, in this case,

the President was “departing from the conclusions of the Disciplinary Committee”. In the impugned decision of 16 March 2018, the President was, in this respect, following the Committee’s conclusions (including that the complainant had acted in good faith) and recommendation which, in turn, was based, as noted in Judgment 3969, on a balanced and thoughtful consideration by the Committee of all the circumstances. In such a case, an executive head does not need to fully motivate acceptance and adoption of the conclusions and applicable recommendation (see Judgment 4044, consideration 7), particularly bearing in mind that the imposition of a disciplinary measure involves the exercise of a wide discretionary power (see Judgment 4460, consideration 8). The complainant’s pleas concerning the downgrading decision are unfounded.

6. The complainant’s pleas concerning the decision of 16 March 2018 insofar as it related to terminating the reduction of her invalidity allowance and reimbursing to the complainant the part withheld until April 2014 are obscure. The March 2018 decision on the invalidity allowance constituted a repetition of the decision, in this respect, made in 2014. It also reflected a recommendation of the Disciplinary Committee. It was necessary for the President to revisit this question because the decisions made in 2014 concerning the reduction of the invalidity allowance had been set aside by the Tribunal in Judgment 3969. At base, it was a decision which benefited the complainant and, accordingly, she has no cause of action to challenge this aspect of the impugned decision (see Judgment 4295, consideration 8). The pleas of the complainant on this topic are unfounded.

7. The complainant has not established any error attending the decision of the President of 16 March 2018. Accordingly, the complaint should be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 17 May 2022, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 6 July 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ