

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

*Registry's translation,
the French text alone
being authoritative.*

S.
v.
EPO

135th Session

Judgment No. 4643

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. S. against the European Patent Office (EPO) on 23 October 2018, the EPO's reply of 12 February 2019, the complainant's rejoinder of 29 March 2019 and the EPO's surrejoinder of 8 July 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 terminate his contract during the probationary period and seeks adequate compensation for the injury he alleges he suffered.

Prior to being recruited by the EPO, the complainant was employed by the Council of the European Union, which had granted him unpaid leave on personal grounds from 16 June 2015 until 15 June 2016, with the possibility of returning to his post. On 16 June 2015 he entered the service of the European Patent Office, the EPO's secretariat, as a human resources lawyer on a fixed-term contract of five years subject to a one-year probationary period. The complainant's interim probationary report dated 15 December 2015 recorded shortcomings on his part and difficulties in meeting the expectations of his supervisors. The report recommended

termination of his contract. On 17 and 21 December, the complainant submitted his comments on the interim report.

By letter of 22 December the complainant was informed of the decision of the Vice-President of Directorate-General 4 (DG4) to dismiss him with immediate effect in accordance with Article 13(4) of the Service Regulations for permanent employees of the European Patent Office and Article 5 of the Conditions of Employment for Contract Staff at the European Patent Office. On 23 March 2016, the complainant lodged a request for review of that decision.

On 1 April 2016 the complainant resumed his post at the Council of the European Union.

By letter of 20 May the complainant's request for review was rejected as irreceivable *ratione temporis* and unfounded. On 18 August the complainant lodged an internal appeal. After hearing the parties on 16 April 2018, the Appeals Committee issued its report on 19 June; it concluded that the Organisation had failed to make the complainant aware of the risk of immediate termination of his contract. It recommended unanimously that the complainant be compensated by a sum equivalent to one month's salary.

By letter of 25 July 2018, the Vice-President of DG4 decided to follow the opinion of the Appeals Committee and award the complainant financial compensation equivalent to one month's salary. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision. He also requests the setting aside of the interim report and its removal from his personal file. The complainant seeks compensation of 8,350 euros for the material injury which he alleges he has suffered. He also seeks moral damages in an amount left to the discretion of the Tribunal. The complainant requests that costs be awarded to him.

The EPO asks the Tribunal to dismiss the complaint as entirely unfounded and to dismiss the claims for compensation and costs.

CONSIDERATIONS

1. The complainant entered the service of the EPO on 16 June 2015 on a fixed-term contract of five years, subject to a one-year probationary period. As regards the probationary period for employees, Article 13 of the Service Regulations for permanent employees of the European Patent Office provides as follows:

“(1) Employees shall serve a probationary period upon appointment pursuant to Article 4, paragraph 1, in order to determine their ability to perform their duties as well as their efficiency and conduct in the service.

(2) The period shall be:

- one year in case of recruitment and promotion,
- six months in case of transfer.

The appointing authority may decide in exceptional cases to extend the probationary period by a further period of up to the same length.

(3) Before the expiry of each period of six months within the probationary period, a report shall be made on the ability of the probationer to perform his duties as well as on his efficiency and conduct in the service. The report shall be communicated to the probationer, who shall have the right to submit his comments in writing.

(4) (a) At the end of the probationary period and on the basis of the probationary report or reports, the appointing authority shall decide, in case of satisfactory fulfilment of duties, efficiency and conduct, to confirm the appointment.

(b) A report on the probationer may be made at any time during the probationary period, if the fulfilment of his duties, his efficiency and his conduct are proving inadequate. On the basis of the probationary report or reports, the appointing authority may:

- dismiss a new recruit on probation,
- decide that the probationer who has been transferred or promoted shall either return to his previous post or, if this has been filled, to a post corresponding to the grade of his previous post for which he satisfies the requirements.

(5) Except where he is entitled forthwith to resume his duties with the national administration or the organisation in which he served prior to his recruitment to the Office, a new recruit on probation who is dismissed pursuant to paragraph 4, letter b, first indent, shall receive compensation equal to two months' basic salary if he has completed

at least six months' service, and to one month's basic salary if he has completed less than six months' service.

[...]" (Underlining added.)

2. As regards a member of the contract staff such as the complainant, Article 5 of the Conditions of Employment for Contract Staff at the European Patent Office also provides the following in relation to the probationary period for those staff, specifically referring to the aforementioned Article 13 as applying to them:

“Article 5

Probationary period

Contract staff shall serve a probationary period. The duration of the probationary period shall be fixed by the President of the Office in the light of the term of the contract; it shall normally last at least six months and should not exceed one year. Otherwise Article 13 of the Service Regulations shall also apply to contract staff.”

Article 1(7) of the Service Regulations states that the provisions of those regulations are to apply to contract staff insofar as there is express provision to that effect in the conditions of employment applicable to such staff.

3. In the present case, following an interim probationary report dated 15 December 2015, and after he had submitted his comments, the complainant was informed of the decision to dismiss him with immediate effect on 22 December 2015, in other words, a little over six months after his recruitment. The rejection, on 20 May 2016, of his request for a review of the decision to dismiss him led to him lodging an internal appeal in which he requested that the decision to dismiss him be set aside, that the aforementioned interim probationary report be removed from his file and that compensation for the injury suffered be awarded to him.

4. In its unanimous opinion of 19 June 2018, which the author of the impugned decision dated 25 July 2018 stated that he intended to follow, the Appeals Committee concluded that the complainant must have known that there was a serious possibility, and even a probability, of failing his probation at the end of the probationary period. The

Committee stated that it was convinced that the complainant had been given sufficient guidance with regard to the Organisation's expectations and timely feedback on his professional shortcomings. However, the Committee found that the complainant had not been informed of the risk of immediate termination of his contract and that this procedural requirement, laid down by the Tribunal's case law, had not been observed.

5. As to the damage caused to the complainant by the immediate termination of his contract without prior warning, the Committee held that reinstatement pending his return to his previous post at the Council of the European Union was not appropriate relief. Instead, the Committee recommended an additional payment of one month's salary, bearing in mind, first, that the Office had already paid the complainant two months' salary and, secondly, that he had resumed his former post at the Council of the European Union on 1 April 2016. In the Committee's view, there was no need to grant the complainant any other compensation in the absence of any bad faith on the part of the Organisation and given that the mere finding of a procedural flaw constituted, in itself, adequate relief for any injury other than material injury.

6. It is therefore apparent from the file that, following his dismissal during the probationary period, the complainant received from the EPO monetary compensation for the whole of the three-month period from January to March 2016, that is to say, two months of his basic salary in accordance with the aforementioned Article 13(5) of the Service Regulations and a further month as recommended in the unanimous opinion of the Appeals Committee. Although the complainant submits that the Organisation should instead have applied Article 15 of the Conditions of Employment for Contract Staff, the Tribunal notes that the provisions to which he refers are in any event less favourable than those contained in Article 13 of the Service Regulations.

In addition, it is established that the complainant resumed his post at the organisation in which he had previously served, the Council of the European Union, from 1 April 2016.

7. In his complaint before the Tribunal, the complainant acknowledges that “the primary claim made in [his] internal appeal, in other words, [his] reintegration in a post within the Office, is no longer feasible”. He also acknowledges that the EPO paid him two months’ salary under Article 13 of the Service Regulations and compensation equal to one month’s basic salary in accordance with the unanimous opinion of the Appeals Committee. Despite that, the complainant submits that the actual prejudice he suffered in terms of salary should be calculated by reference to his net salary, but he does not explain his reasoning or provide further details of the calculations to support his assertion. In those circumstances, this plea must fail.

8. As regards his request for the interim probationary report of 15 December 2015 to be set aside, the complainant submits first of all that no objectives were set for him at the start of or during the probationary period. However, the Tribunal notes that the complainant received personalised training based on the objectives associated with his duties, which met the requirements under the Tribunal’s case law. The complainant then relies on various arguments which, at best, establish that he disagreed with the findings and conclusions of that report. The complainant cannot, however, successfully claim that the report is flawed just because he disagrees with it. The Committee observed in its opinion that, from the documentary evidence submitted to it in relation to the complainant’s alleged shortcomings, it found no reason to conclude that there was any error in the Organisation’s assessment of him. In his written submissions, the complainant essentially invites the Tribunal to carry out a re-assessment and to replace the Organisation’s evaluation with its own. That is not the role of the Tribunal.

In Judgment 4505, consideration 3, the Tribunal stated the following concerning the purpose of probation, the wide discretion that an organisation enjoys with regard to probation and the limited power of review that the Tribunal has in the matter:

“In its case law, the Tribunal has held that ‘the purpose of probation is to permit an organization to assess the probationer’s suitability for a position’ (see Judgment 4212, consideration 4). The Tribunal has also pointed out that an organisation enjoys wide discretion with regard to

probation and that, for this reason, decisions taken in this context are subject to only limited review (see, for example, Judgment 4481, consideration 3). Thus, under the Tribunal's settled case law, a decision of this kind will only be set aside if it is taken without authority or in breach of a rule of form or of procedure, or if it is 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 an abuse of authority. Moreover, where the reason given for refusal of confirmation is unsatisfactory performance, the Tribunal will not replace the organisation's assessment with its own (see, in particular, Judgments 1418, consideration 6, 2646, consideration 5, 3913, consideration 2, and aforementioned 4212, consideration 4)."

The Tribunal notes in this regard that the procedural defect for which the Committee criticised the EPO in the present case, and which warranted the award to the complainant of a further month's salary, concerns the Organisation's failure to observe the requirement to make the complainant aware of the risk of immediate termination of his contract. The submissions do not show that the complainant's interim probationary report was drawn up unlawfully. On the contrary, it was drawn up in accordance with the provisions of Article 13 of the Service Regulations.

In this context, the Tribunal must dismiss the complainant's claim for the interim progress report to be removed from his file, since there was nothing unlawful about it (see, for example, Judgment 1811, consideration 8).

9. As regards the complainant's plea concerning the reasoning, which he regards as deficient, in the impugned decision, the Tribunal notes that the decision, which not only refers to the detailed analysis made by the Appeals Committee, but also endorses the Committee's unanimous recommendation to allow the appeal and to make an additional payment to the complainant of a month's salary, satisfies the requirements of the case law on the reasoning of decisions. The impugned decision, and the opinion of the Committee to which the decision refers, enable the complainant to understand the reasons for that decision and the Tribunal to exercise its power of review (see Judgments 4467, consideration 7, and 4037, consideration 7).

10. The complainant claims reimbursement of the cost of moving to Belgium to resume his post at the Council of the European Union. However, first, the complainant has not established that he is entitled to such a reimbursement under any applicable provision. Secondly, given that the only defect in the decision terminating his probationary period was a procedural irregularity and that the decision was otherwise justified on the merits, the complainant has not established any causal link between the unlawfulness of the decision and the damage he alleges.

This claim is also unfounded.

11. Lastly, with regard to the moral damages sought by the complainant, who leaves this part of his claim to be assessed by the Tribunal, the complainant has not shown how the Organisation failed in its duty of care or in its obligation to act in good faith. In addition, the damage, which the complainant justifies in terms of the “considerable psychological burden” and the “professional and logistical strains imposed on [his] whole family” by his dismissal of 22 December 2015, has not been established. According to the case law of the Tribunal, in relation to damages and in particular to moral damages, the complainant bears the burden of proof (see Judgment 4156, consideration 5). However, as the Committee observes in its opinion, the award to the complainant of three months’ salary following his dismissal during his probationary period constitutes adequate relief for any injury that might have resulted from the procedural flaw committed by the Organisation in failing to make the complainant aware of the risk of immediate termination of his contract.

12. It follows that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2022, Mr Patrick Frydman, Vice-President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLÉMENT GASCON

DRAŽEN PETROVIĆ