

P. (No. 10)

v.

EPO

125th Session

Judgment No. 3971

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr A. P. against the European Patent Organisation (EPO) on 25 August 2015 and corrected on 4 December 2015, the EPO's reply of 14 March 2016, the complainant's rejoinder of 21 June, the EPO's surrejoinder of 26 September 2016, the complainant's additional submissions of 15 June 2017 and the EPO's final comments of 18 August 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 decisions to ban him from entering the EPO's premises, to suspend him from duties and to downgrade him.

In 2008 the complainant, who is a permanent employee of the European Patent Office – the secretariat of the EPO –, was appointed by the Central Staff Committee as a full member of the Internal Appeals Committee (IAC). In 2014 he was released on a full-time basis from his official duties to work as an IAC member. That same year modifications were made by the EPO concerning the IAC, in particular as to the fact that the Central Staff Committee had to appoint IAC members among elected members of the Central Staff Committee or of the Local Staff Committee (Administrative Council decision CA/D 2/14), and about

the resources and facilities to be granted to the Staff Committee as from 1 July 2014, the date of entry into force of the new measures laid down in Circular No. 356 of 2 April 2014. Circular No. 356 replaced Communiqué No. 45.

On 25 March 2014 the complainant informed the Chairperson of the IAC that he would not participate in the IAC session held that day as he was on strike. He subsequently informed the Chairperson of the IAC that he would not be able to attend the June and July sessions of the IAC because of his existing workload and the limited support received from the secretariat. The Chairperson did not accept his reasons as “compelling reasons” and stressed the importance of the IAC’s work. Several emails were exchanged in that respect.

The complainant stood for election to the Staff Committee for a mandate starting on 1 July 2014, but was not elected. At the end of June 2014 he asked the President of the Office for some clarification as to the fact that, pursuant to Circular No. 356, members of the IAC who, like him, had not been elected could continue to deduct their time in accordance with Communiqué No. 45 until any work in progress was completed, up to but not beyond 31 December 2014. He wondered what was meant by “work in progress”. The Principal Director of Human Resources replied that those terms covered the planned meetings between July and September and the examination of the files on the role for those sessions. In October the complainant resigned from his duties as a member of the IAC.

On 3 November the complainant was informed of the decision taken by the President of the Office to suspend him from duties until further notice on the ground that his persistent refusal to participate in the work of the IAC and his attitude, which aimed at intentionally disrupting and ultimately blocking the work of the IAC, constituted a severe violation of his official duties that appeared to constitute misconduct. He was also informed that during the suspension he should not go to work or enter any EPO premises. On 10 November he objected to the suspension decision, requesting that the decision be withdrawn and that he be allowed to access his workplace and continue his duties

as an examiner. On 14 November his request was rejected on the ground that his misconduct was of a very serious nature.

In the meantime, on 10 November, the Principal Director of Human Resources informed the complainant that, on the basis of the report established in accordance with Article 100 of the Service Regulations for permanent employees of the Office, the Administration had initiated disciplinary proceedings against him and had referred the matter to the Disciplinary Committee.

After having held oral hearings, the Disciplinary Committee issued its opinion on 17 December 2014. It concluded that the complainant had not committed misconduct by going on strike for half a day, by not sitting in most of the June and July sessions of the IAC and by withdrawing from any further work in the IAC in October. However, he had acted in breach of Articles 5(1) and 20 of the Service Regulations and Article 8(1) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, and Articles 7 and 8 of the Data Protection Guidelines by disclosing confidential information relating to internal appeal files to the Disciplinary Committee and to his lawyer. The disclosure of information had taken place in the context of the disciplinary proceedings. The Disciplinary Committee considered that the error committed by the complainant occurred “in the heat of the moment” and that it was unlikely that he would ever make the same mistake again. Thus, it recommended to impose the disciplinary measure of relegation in step.

On 15 January 2015 the President informed the complainant that he had decided not to endorse the opinion of the Disciplinary Committee, but instead to impose on him the disciplinary measure of downgrading. He considered that the complainant had been continuously reminded that he had an obligation to participate in the meetings of the IAC. He also considered that the complainant was wrong in believing that the unauthorised disclosure of confidential information in the course of the disciplinary proceedings was not prohibited. In view of his long experience as an IAC member, he had an increased responsibility to respect the confidentiality of data. Accordingly, as from 1 February 2015, he would be assigned to grade A2, step 7, which would correspond

to grade G9, step 5, under the new salary scale applicable as of 1 January 2015. The President added that the decision to suspend him would end and that he was expected to return to work on 19 January 2015.

On 15 April the complainant requested the President to review his decision. By a letter of 27 May 2015 the President informed the complainant of his decision to reject the request for review as unfounded. In accordance with applicable provisions, the complainant filed a complaint with the Tribunal impugning that decision.

The complainant asks the Tribunal to set aside the impugned “decisions” to ban him from entering the EPO’s premises, to suspend him from duties and to downgrade him. He also asks the Tribunal to grant him the step increases, salary, benefits, pension contributions and any other emoluments he would have received had these decisions not been taken. He claims moral damages and exemplary damages, together with reimbursement of the legal costs incurred with respect to both the present proceedings and the internal proceedings. He also claims interest on all amounts awarded to him at the rate of 5 per cent per annum from 3 November 2014 until the date of payment of such amounts. Lastly, he asks the Tribunal to award him any other relief it deems equitable, fair and necessary. In his rejoinder, he indicates that if the Tribunal considers that the claims he made with respect to the decision to suspend him from duties are irreceivable, he asks the Tribunal to take into account, when determining the amount of moral damages to be awarded, the personal and professional humiliation and prejudice that he has suffered as a consequence of the illegal suspension decision.

With respect to the claim to set aside the suspension decision, the EPO asks the Tribunal to dismiss the complaint as irreceivable for failure to exhaust internal remedies. It asks the Tribunal to dismiss the complaint as being otherwise unfounded, and to dismiss the claim for costs. With respect to the claims made in the rejoinder concerning personal and professional humiliation and prejudice as a consequence of the suspension decision, the EPO asks the Tribunal to reject them as irreceivable for failure to exhaust internal means of redress as they were raised for the first time in the rejoinder.

CONSIDERATIONS

1. The complainant impugns the 27 May 2015 decision of the President of the EPO to reject his 15 April 2015 request for review of the President's previous 15 January 2015 decision to apply the disciplinary sanction of downgrading under Article 93(2)(e) of the Service Regulations with effect from 1 February 2015.

2. Following a disciplinary procedure regarding the complainant's alleged misconduct, the Disciplinary Committee concluded that the complainant had not committed misconduct by going on strike for half a day, by not sitting in most of the June and July 2014 sessions of the IAC, and by withdrawing from any further work in the IAC in October. However, it found that the complainant, in committing a breach of confidentiality, had contravened Articles 5(1) and 20 of the Service Regulations, Article 8(1) of the Implementing Rules for Articles 106 to 113, and Articles 7 and 8 of the Data Protection Guidelines. It recommended, in accordance with Article 93(2)(d) of the Service Regulations, to impose on him the disciplinary measure of relegation in steps.

3. In his 15 January 2015 decision, the President noted that in the disciplinary proceedings, the complainant was accused of intentionally disrupting and ultimately blocking the work of the IAC by his attitude and actions while he was a full-time IAC member. He was accused of thereby severely damaging the interests of the service, as clearly evidenced by his refusal to participate in the hearings held by the IAC (save for the one hearing on 27 June 2014) and in the June and July sessions. He was further accused of having committed, in the framework of the disciplinary proceedings, an additional disciplinary offence by disclosing confidential and personal appeal-related information concerning staff to unauthorised third persons. The President stated that the Disciplinary Committee had been duly composed amongst the members drawn from the relevant lists. He clarified that "contrary to what ha[d] been considered by the [Disciplinary Committee] the facts related to [the complainant's] participation in strike on 25 March 2014

and final withdrawal from work of the IAC in October 2014 [had] not been put forward by the Office as separate misconduct”.

4. With regard to the merits, the President highlighted that the Disciplinary Committee was invited to evaluate the complainant’s conduct “globally” with regard to the universal obligations and responsibilities of international civil servants as well as in consideration of the specific obligations of IAC members. He noted that the Disciplinary Committee had not applied such a global view and, in considering the non-participation in the hearings of the IAC as separate misconduct, had disregarded that the relevant misconduct was the systematic refusal and obstruction to the functioning of the IAC. To justify his decision not to follow the Disciplinary Committee’s opinion, he noted inter alia that “the responsibility for discharge of duties under Article 24 [of the Service Regulations was] especially fundamental for an IAC member with full time deduction for his normal duties”, and that “in the framework of a joint body, the opinion and discretion of a single committee member [could not] prevail over the authority of the Chairperson or the IAC as a body or lead to the refusal to perform the core duties in such a committee”. The President stated that the Disciplinary Committee had “insufficiently considered that accepting [the complainant’s] behaviour leads to a total disregard of the function of the Chairperson of any statutory or collegiate body and seriously endangers the generally cooperative attitude that must prevail among its members”. He also noted that there was no ambiguity about the complainant’s responsibility and the applicable rules, and that, contrary to the Disciplinary Committee’s opinion, “other commitments” referred to in Article 2(3) of the Rules of Procedure (RP) of the IAC could not entail the commitments resulting from already heard cases in the very same Committee. The President did not agree with the Disciplinary Committee’s lighter assessment of responsibility with regard to the complainant’s disclosure of confidential information (regarding the personal details of at least 48 appellants and their appeals), in particular considering that the complainant had been expressly reminded to maintain confidentiality and had participated as member of the IAC “in a similar internal appeal [...] where the IAC highlighted that the right to

defend oneself [did] not extend to breach the rights of confidentiality of third persons”.

5. In light of the reasons given in his letter of 15 January 2015, the President decided that he could not follow the opinion of the Disciplinary Committee and instead decided to impose the disciplinary sanction of downgrading under Article 93(2)(e) of the Service Regulations.

6. The complainant bases his complaint on the following grounds:

- the President’s decision not to follow the Disciplinary Committee’s opinion was not properly justified;
- the decisions to suspend him from duties, to ban him from entering the EPO’s premises, and to initiate disciplinary proceedings were procedurally flawed;
- the decisions to suspend him from duties, to ban him from entering the EPO’s premises, and to downgrade him were the result of the violation of the applicable law;
- the decision to suspend him from duties and to ban him from entering the EPO’s premises violated his right of association;
- violation of his due process rights with respect to the decision to suspend him from duties and during the disciplinary proceedings;
- the impugned disciplinary sanction and the suspension decision were based on mistakes of fact and erroneous conclusions;
- the decisions to suspend him from duties with immediate effect and to downgrade him violated the principle of proportionality;
- the decisions to suspend him from duties, to ban him from entering the EPO’s premises and to downgrade him were measures of reprisal for him being a staff representative; the Organisation acted in violation of its duty of care; and
- the decision to apply the new grade system was made in violation of applicable rules.

7. As the written submissions are sufficient for the Tribunal to reach a reasoned opinion, the request for oral proceedings is denied.

8. All claims regarding the complainant's suspension, house ban, and the application of the shift from the A grade category to the G grade category in 2015 in accordance with the new grade system, are irreceivable for failure to exhaust the internal means of redress. The complainant did not file an internal appeal challenging those decisions separately (regarding the suspension and ban), nor did he challenge the shift in grades in his request for review of the 15 January 2015 decision, and cannot do so now in the present complaint. The house-ban decision as well as the suspension decision have, by themselves, an immediate, material, legal, and adverse effect on the person concerned, and are not subsumed under the final decision taken at the conclusion of any disciplinary proceedings. Consequently, they cannot be considered as mere steps leading to the final decision taken at the conclusion of the proceedings and, according to the Tribunal's case law, must be challenged by themselves, and not as a part of the final decision (see Judgments 1927, under 5, 2365, under 4, and 3035, under 10).

9. The complaint is unfounded. The complainant's claim that the President's decision was not properly justified, insofar as it did not follow the Disciplinary Committee's opinion, is unfounded. In his 15 January 2015 decision, the President contested the Disciplinary Committee's opinion in a general way, stating that "[r]egrettably the [Disciplinary Committee] ha[d] disregarded this general framework and [had] not applied such a global view". The President then expressed his reasoned criticism of the specific points on which he disagreed with the Disciplinary Committee.

10. The claim regarding a procedural flaw (violation of Article 93(4) of the Service Regulations) in the decision to initiate disciplinary proceedings is unfounded. Article 93(4) provides that "[d]isciplinary proceedings shall be initiated by the appointing authority where necessary on a report made by the immediate superior of the employee concerned". In the present case, the President, who is the appointing authority for the complainant, had delegated the power to initiate disciplinary proceedings against a staff member to the Principal Director of Human Resources by an act of delegation of

November 2008. The Tribunal notes that delegation is a normal method for exercising authority within an organization and the reference to Article 93(4) of the Service Regulations, contained in Article 5 of the Act of Delegation, indicates that the person to whom the authority to initiate disciplinary proceedings is delegated is the Principal Director of Human Resources. Article 5(1) of the Act of Delegation, under “Disciplinary measures”, provides as follows:

“[f]or the purpose of examining the possibility to initiate disciplinary proceedings against a staff member under Art. 93(4) [of the Service Regulations], the authority to initiate investigations concerning potential breaches of the Service Regulations and to inform the concerned staff member accordingly is delegated to the Principal Director Human Resources.”

In the present case, the Principal Director of Human Resources properly initiated the proceedings in accordance with Articles 93(4) and 98(2) of the Service Regulations. Article 98(2) provides that:

“[w]ithin five days of receipt of a communication from the President of the Office initiating either disciplinary proceedings in respect of a permanent employee or the procedure provided for in Article 25 or Article 52 against any such employee, the Chairman of the Disciplinary Committee shall, in the presence of the employee concerned, draw lots from among the names on the lists to decide which four members shall constitute the Committee, two being drawn from each list.

The Chairman shall inform each member of the composition of the Committee.”

11. The complainant claims that the Disciplinary Committee was not properly composed. This claim is unfounded. The member of the Disciplinary Committee who was originally chosen during the drawing of lots but who was no longer a current staff member was replaced by another drawing of lots from the list prepared prior to the initiation of the proceedings. The complainant also contests that the first selected members of each group were replaced by another member. This is not a flaw because it is allowed under the Service Regulations. The Disciplinary Committee was duly composed with the proper representation of members recommended by the Staff Committee and the Office.

12. The main argument raised by the complainant is that his refusal to attend IAC hearings was justified by the heavy backlog of work he had accumulated. This argument is not accepted. The core duties of an IAC member include: studying the cases in preparation for the hearings and sessions, attending and participating in the hearings and sessions, and completing the opinions or dissenting opinions following the hearings and sessions within the deadlines provided. His refusal to attend the hearings and sessions of the IAC constituted a violation of Article 14(1) of the Service Regulations, which provides that “[a] permanent employee shall carry out his duties and conduct himself solely with the interests of the European Patent Organisation [...] in mind”. Article 17(1) of the RP of the IAC, under the heading “Schedule of sessions”, provides that “[a]t the start of each year, the committee agrees on a schedule of sessions for that year. It may amend the schedule during the year.” Article 1(2) of the RP of the IAC provides that “[u]nless otherwise provided, procedural decisions are taken and justified by the chairman. The members are given access to the relevant information. At a member’s request, the committee votes on such decisions.” The complainant refers to Article 2 of the RP of the IAC on “[d]eputising for the chairman and members”, submitting that he has the right not to attend hearings due to “other commitments”. Article 2(2) of the RP of the IAC provides that “[m]embers must inform the chairman without delay if and why they require a deputy. The chairman ensures that their alternate is notified, and the other members informed. The same applies if a member resigns.” Article 2(3) of the RP of the IAC provides that “[r]easons for requiring a deputy include partiality, illness and other commitments”.

13. The Tribunal points out that the right not to attend hearings, in accordance with the provisions cited above, is not an unfettered right. Cases of illness give rise to an unfettered right, partiality gives rise to a duty, and “other commitments” must be evaluated on an individual basis. As a matter of construction, the expression “other commitments” cannot be a reference to the core duties of a member of the IAC which are specified elsewhere. While the Chairperson can exceptionally decide to excuse a member from a hearing or session for work-related

concerns, a member cannot, without the Chairperson's authorization, decide not to attend a hearing or a session based on her/his workload. The existence of a right not to attend for the reason relied on by the complainant would deny or subvert the Chairperson's power to take organizational decisions, and the exercise of this power is fundamental to the proper functioning of the system of internal appeals.

14. The claim that Article 112 of the Service Regulations on the "[i]ndependence and impartiality of the Appeals Committee" must be interpreted as excluding the authority of the Chairperson is unfounded. Article 112(1) provides that "[t]he chairman and members of the Appeals Committee and their alternates shall be completely independent in the execution of their task. They shall neither seek nor accept any instructions." The "execution of their task" refers exclusively to the exercise of the function of the IAC Chairperson and its members, which is to render an opinion. It does not refer to the reasonable administration of the work of the IAC, which includes, inter alia, the prioritization of the workload for each session.

15. The complainant's claims that the decision to downgrade him was the result of a violation of the applicable law and that it limited his due process rights are unfounded. The complainant asserts that the Organisation unlawfully submits that the fact that he had breached confidentiality during the Disciplinary Committee's proceedings constituted another proof of misconduct. He states that this is procedurally inadmissible and irregular as it was not included in the initial charges. The Tribunal notes that the Disciplinary Committee addressed this issue explicitly in the proceedings and in its final report. The Disciplinary Committee has the prerogative to immediately address something which occurs during the proceedings, in the interest of procedural efficiency. As the complainant was given the opportunity to comment on the alleged breach of confidentiality, the principle of due process was respected. The complainant had adequate time to prepare his defence.

16. The claim that the impugned disciplinary sanction was based on mistakes of fact and erroneous conclusions is unfounded. As noted above, the complainant did not have the right to refuse to attend any hearings or sessions based on his heavy backlog in preparing minority opinions. Therefore, the President was correct to find that by doing so he had essentially refused to carry out his duties as an IAC member, which constituted misconduct.

17. The claim that the decision to downgrade the complainant violated the principle of proportionality is unfounded. Regarding the severity of the sanction, the case law has it that “[t]he disciplinary authority within an international organisation has a discretion to choose the disciplinary measure imposed on an official for misconduct. However, its decision must always respect the principle of proportionality which applies in this area” (see, for example, Judgment 3640, under 29). The complainant’s refusal to attend the IAC hearings and sessions was particularly onerous for the Organisation considering the heavy backlog of internal appeals that the IAC needed to confront. Keeping in mind that the Tribunal cannot substitute its evaluation for that of the disciplinary authority, the Tribunal limits itself to assessing whether the decision falls within the range of acceptability. In the present case, the Tribunal finds that the sanction imposed is not disproportionate.

18. The claim that the decision to downgrade the complainant was a reprisal measure for the complainant’s participation as a staff representative, in violation of the Organisation’s duty of care, is unfounded. The complainant has not provided any persuasive evidence to support this assertion.

19. In light of the above, the complaint must be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 1 November 2017, 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 24 January 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ