

W. (No. 13)

v.

EPO

126th Session

Judgment No. 4042

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Ms M. E. W. against the European Patent Organisation (EPO) on 6 September 2016 and corrected on 1 December 2016, the EPO's reply of 13 March 2017, corrected on 12 April, the complainant's rejoinder of 24 July, corrected on 7 August, the EPO's surrejoinder of 9 October, the complainant's further submissions of 8 December 2017 and the EPO's final comments thereon of 17 January 2018;

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 her for misconduct.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat. At the material time she was the Treasurer of the Executive Committee of the Munich Section of the Staff Union of the European Patent Office (SUEPO Committee Munich).

In June 2015 Mr C., a staff member who had been involved in internal proceedings against the EPO, informed the Administration that the complainant was putting pressure on him to continue his case before the Tribunal to seek reimbursement of costs, otherwise SUEPO would

take legal action against him. He provided the Administration with an agreement that he had signed in 2012 with Mr B., acting as Chairman of the SUEPO Committee Munich (the 2012 agreement). The agreement, which incorporated a standard agreement entitled “Rules for the Grant of Legal Assistance by SUEPO” (the general agreement), provided that SUEPO would cover the costs incurred in legal proceedings initiated by Mr C. against the EPO but that if, at any time, he breached any part of the agreement including the rules contained in the general agreement, SUEPO could withdraw its financial support. The general agreement relevantly provided that the staff member “shall at all times entrust the whole procedure to the lawyer, either directly or through SUEPO’s Legal Advisor” and “shall at no time communicate directly with the Office on matters concerning the litigation without the prior and express approval of the external lawyer or the [SUEPO] Legal Advisor”. It further provided that “[w]here the legal proceedings end with a judgment for the Applicant and costs are awarded, the Applicant shall reimburse the Committee either (i) the total costs incurred by SUEPO, or (ii) the remainder of the award of costs after the Applicant’s own costs [...] have been deducted, whichever is the smaller”. The 2012 agreement also similarly provided that “[i]n the event of successful action and the award of costs, the Applicant shall reimburse the Committee [...]”.

By a letter of 2 November 2015 the complainant was informed that the EPO considered that the general agreement could be considered void, at least partially, as it unduly limited the exercise of the staff member’s rights. She was accused of having exercised undue pressure on Mr C., who had expressed his wish to settle, by suggesting that the agreement obliged him to reimburse SUEPO for the legal fees (more than 20,000 euros) of the lawyer who had assisted him in his internal appeal if he did not continue litigation before the Tribunal and by threatening him with a lawsuit if he refused to do so. She was invited to comment on these charges. It was also indicated that that letter could not be disclosed to any third parties. On 12 November the complainant denied these allegations. The complainant forwarded the letter of 2 November 2015 to SUEPO Committee Munich, which published it on the SUEPO website, partially redacted.

On 17 November the complainant was informed that the Administration had decided to refer the case to the Disciplinary Committee for an opinion and that she was suspended from service, with pay, with immediate effect pursuant to Article 95(1) of the Service Regulations for permanent employees of the European Patent Office. An oral hearing was held on 14 December 2015.

In its submissions before the Disciplinary Committee, the EPO Administration clarified that the allegation of breach of duties by the complainant concerned the exercise of undue pressure on a colleague (Mr C.) in order to prevent a settlement between the EPO and that colleague and that, for the assessment of that allegation, no opinion on the validity of the 2012 agreement was requested. It also alleged that the complainant had breached confidentiality relating to the investigation and disciplinary process by disclosing the letter of 2 November 2015 to third parties. In its reasoned opinion of 15 December 2015 the Disciplinary Committee unanimously found that in her statements to Mr C. the complainant had misrepresented the terms of the 2012 agreement to steer him to certain behaviour relating to his internal appeal and that, in doing so, she had failed to comply with the high standards expected of permanent employees under Articles 5(1) and 14(1) of the Service Regulations. With respect to the letter of 2 November the Disciplinary Committee found that she had failed to comply with her duty to exercise the greatest discretion with respect to confidential matters. It unanimously recommended the sanction of deferment of advancement to a higher step for a period of three years from the end of 2015.

By a letter of 15 January 2016 the President of the Office informed the complainant that he had decided to endorse the Disciplinary Committee's conclusions but to impose on her the disciplinary sanction of downgrading of one grade and two steps with effect from 1 February 2016 for serious misconduct.

On 12 April 2016 the complainant requested that the decision of 15 January be reviewed. Her request was rejected as unfounded on 10 June 2016. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to retroactively reinstate her to the grade she held prior to 1 February 2016. She seeks material, moral and exemplary damages, with interest on all sums awarded. She also claims costs for the disciplinary proceedings and the proceedings before the Tribunal. Lastly, she requests the production of various documents.

The EPO submits that the complaint is partially irreceivable, with respect to the complainant's challenge of the suspension decision and her objection to the composition of the Disciplinary Committee, for non-exhaustion of internal remedies, and that it is otherwise unfounded. It considers that her request for the production of documents is likewise unfounded.

In her further submissions of 8 December 2017 the complainant objects to the EPO's arguments on receivability and considers that they are evidence of bad faith and constitute an abuse of power on its part. She contests the accuracy of the written transcript of the hearing before the Disciplinary Committee and asks the Tribunal to order the EPO to produce the audio recording.

In its final comments the EPO submits that the latter request is unfounded.

CONSIDERATIONS

1. The complainant is a member of the staff of the EPO. During the period in which the events occurred central to this complaint, the complainant was the Treasurer of the SUEPO Committee Munich.

2. In late 2015, the complainant was the subject of disciplinary proceedings before a Disciplinary Committee resulting in a decision of the President in a letter of 15 January 2016 to impose a disciplinary sanction for misconduct. A request for review was unsuccessful, culminating in a decision of the President of 10 June 2016 to reject the request as unfounded. This is the decision impugned in these proceedings.

3. In broad outline, the circumstances surrounding the allegations of misconduct were as follows. Another EPO staff member, Mr C., signed an agreement in September 2012 (the 2012 agreement). Generally, the subject matter of the agreement was the provision by SUEPO of funding for legal assistance to Mr C. in pursuing a grievance and maintaining proceedings against the EPO. The agreement was in two parts. The first part was specific to the circumstances of Mr C. The second, incorporated into the first, set out the “Rules for the Grant of Legal Assistance by SUEPO” (the general agreement). The signatories to the 2012 agreement were Mr C. and Mr B., the latter being identified as the Chairman of the SUEPO Committee Munich.

4. In 2012 Mr C. pursued a grievance with the EPO (involving an allegation, amongst other things, of harassment) including the pursuit of an internal appeal which had been unsuccessful and dismissed as irreceivable. He had, however, achieved some success as a result of this grievance in the sense that he had been moved to another position in March 2013. Nonetheless Mr C.’s pursuit of the matter had involved an external lawyer whose fees exceeded 20,000 euros for 2012. Mr C. had received two invoices for 2012 by the external lawyer for a sum totalling 20,372.80 euros and a third invoice for 2013 estimated at approximately 5,000 euros. In due course, the EPO offered to settle the matter with a payment of 2,500 euros.

5. Against the background referred to in the preceding consideration, the complainant communicated with Mr C. on 27 June 2015 by means of WhatsApp messenger in the following terms:

“[...] You would be the first not to appeal in order to claim reimbursement. And in the contract you signed paragraphs 10 and 11 specify that you undertake to go all the way. In other words, to claim the money from the Office all the way to Geneva otherwise Suepo will have to take legal action against you. [...]”*

* Registry’s translation.

6. A copy of this communication was emailed by Mr C. to Ms L. of the EPO on 29 June 2015. Ms L. was Administrator Human Resources of the EPO. In a further email, dated 1 July 2015, from Mr C. to Ms L., Mr C. said:

“I was visited today by [the complainant] who was asking me to go to Geneva or face a tribunal case that will be submitted by the same lawyer who was helping me! (which is in my opinion illegal) [...]”

7. By letter dated 2 November 2015, the Principal Director Human Resources wrote to the complainant. The letter was marked, at the top, “Personal/Confidential”. The letter set out over almost two pages the reasons why the EPO considered that the general agreement was void, at least partially. The letter then addressed the complainant’s conduct in relation to Mr C. saying:

“[...] you seem to have exercised undue pressure on [Mr C.] requesting him to either reimburse the legal fees covered by SUEPO for his case or pursue his case further with a complaint before the [Tribunal]. By that, and although [Mr C.] expressly indicated to you his reluctance to continue the litigation against the [EPO], you have actively participated in the implementation of this unlawful agreement, which infringes the general interests of justice as well as [Mr C.’s] fundamental rights. This seems to be a breach of the highest standards of integrity expected from you.”

The letter went on to say that this conduct may be viewed as a breach of the EPO Service Regulations and that a failure to comply with the Service Regulations “shall make [a permanent employee] liable to disciplinary action”. The letter went on to invite the complainant to “[...] state [her] case in writing or provide any further comments [...] within 10 calendar days”. The letter concluded with a paragraph: “For the sake of clarity, it is noted that the present communication cannot be published, communicated or disclosed to any third parties (with the exception of a legal adviser for the purpose of defence).”

8. By letter dated 17 November 2015 from the Chairman of the Disciplinary Committee, the complainant was informed that the Principal Director Human Resources had initiated a disciplinary procedure against her. The basis of the case against her was set out in a report by the Principal Director of the same date under Article 100

of the Service Regulations. By another letter of the same date, the complainant was suspended with pay.

9. On 18 December 2015 the Disciplinary Committee delivered a reasoned opinion (dated 15 December) concluding, unanimously, that the complainant had failed to comply with her duties under the Service Regulations and recommending a sanction of deferring her advancement to a higher step through a period of three years. In his letter of 15 January 2016, the President indicated that he endorsed the Committee's conclusions but decided that the appropriate sanction was to downgrade the complainant. In his decision of 10 June 2016 on the complainant's request for review, the President adhered to his January 2016 decision.

10. In the pleas in the proceedings before the Tribunal the complainant raises, and the EPO contests, a range of arguments seeking to impugn the decision of 10 June 2016. In her brief, the complainant advances four legal arguments. The first is that the impugned decision is unlawful *per se* as the acts in question leading to the charges against the complainant did not constitute misconduct. The second is that the impugned decision is unlawful as the disciplinary proceedings were tainted with procedural irregularities and violated the complainant's right to a fair trial. The third is that the disciplinary sanction imposed on the complainant resulted from the application of an improper standard of proof coupled with a repetition of the argument that the acts in question did not constitute misconduct let alone serious misconduct. The result was that the original decision imposing the disciplinary sanction was wholly disproportionate. The fourth and final argument is that the impugned decision was taken as a retaliatory measure directed against the complainant as a staff representative.

11. It is convenient to consider the first of these arguments initially by reference to what is described as the second charge against the complainant and secondly by reference to what is described as the first charge. That is because there is an obvious flaw in the consideration of the second charge that can be dealt with immediately.

12. The complainant argues she has not breached the principle of confidentiality. In its opinion of 15 December 2015, the Disciplinary Committee commenced by setting out its conclusions. In relation to the second charge, the Committee, whose reasons the President embraced, said that the complainant had failed to comply with her duties under the Service Regulations and, specifically, “with her duty to exercise the greatest discretion with respect to confidential matters as required by Article 20 [of the Service Regulations]”.

13. Article 20 has two elements. The second is irrelevant, relating as it does to confidentiality of “matter[s] dealing with the work of the Organisation”. The first element requires a permanent employee to: “[...] exercise the greatest discretion with regard to all facts and information coming to his knowledge in the course of or in connection with the performance of his duties; [the permanent employee] shall not in any manner whatsoever use or disclose to any unauthorised person any document or information not already made public”. It may be doubted that this provision is intended to do anything more than prevent public disclosure of facts or documents revealed to the staff member while working at the EPO. However, assuming the provision is cast more widely, it did not prevent the disclosure made by the complainant. That is to say, the complainant was not under a duty not to do what in fact she did.

14. When addressing the specific facts of the second charge, the Disciplinary Committee observed, correctly in this case, that the mere fact the sender of a letter or other communication states that the communication is confidential does not result in an obligation for the recipient to keep that communication confidential. As to the specific facts revealed by the material before the Committee, it said:

“[It] has no evidence that the [complainant] has herself published the letter or has caused it to be published. However, it is evident that she has shared the letter with a third party. The Disciplinary Committee is not able to establish whether sharing the letter in itself amounts to a breach of confidentiality, since the [complainant] may have shared it in order to obtain legal advice e.g. from a Suepo legal adviser. However when sharing the letter, the [complainant] had a duty to ensure that the third party with whom it was shared did not use it for

purposes other than advising her legally and at least to ensure that the letter was deleted from the Suepo website as soon as she discovered its disclosure there. The [complainant] failed to do so. In this respect, while the fact that the name of [Mr C.] was made illegible in the version on the Suepo's website shows some intention to respect confidentiality, it fails to do so fully as he could still be identifiable by the facts stated in the letter."

15. In her pleas, the complainant admits she forwarded the letter to SUEPO in order to inform SUEPO and to obtain instructions from it. She says, and this is not challenged by the EPO in its pleas, that SUEPO then published the letter to its members by, it appears, publication on its website. That the complainant forwarded the letter to SUEPO is unexceptionable conduct. Much of the letter of 2 November 2015 was a critique of the general agreement arguing that the agreement was "void, at least partially". This conclusion was based on detailed reference to specific provisions of German law. As to the specifics of the case of Mr C., the letter argued that the complainant had "actively participated in the implementation of this unlawful agreement, which infringes the general interests of justice as well as [Mr C.'s] fundamental rights". Plainly enough the complainant was entitled to share the letter with others in SUEPO, both as a general critique of the lawfulness of the general agreement and a manifestation of the Administration's view of her conduct said to be an "implementation" of it. It is well settled that staff representatives must enjoy a broad freedom of speech (Judgment 3156, consideration 12) and it was not unlawful for the complainant to disseminate the letter of 2 November 2015 as she admitted doing.

16. Article 20 did not create an obligation on the complainant to take steps to ensure the deletion of the letter from the website. As a general proposition, a provision of a staff rule or regulation founding a charge of misconduct should not be widely or liberally construed so as to capture conduct potentially at the very margins of the conduct proscribed by the rule or regulation. It should be construed only to capture conduct clearly within the boundaries of the rule or regulation. The posting of the letter on the website was a result of the conduct of

others. The imposition of a disciplinary sanction on the complainant referable to the second charge was not legally based.

17. Turning to the first charge, it is convenient first to consider what the 2012 agreement (including the general agreement) says, or does not say, about the obligations of Mr C. in relation to monies spent on his behalf to pursue litigation against the EPO. Firstly, in the 2012 agreement, it appears from a handwritten annotation that SUEPO agreed to pay 100 per cent of the costs incurred by Mr C. (rather than two-thirds of the costs as specified in the typed version of the agreement) in proceedings pursuing a grievance that included allegations of harassment. In terms, the agreement was not with SUEPO but was with the “Committee of the Staff Union of the European Patent Office in Munich” but, for present purposes, it is helpful for reasons of economy of language to treat SUEPO as one of the two contracting parties.

18. The first applicable provision operated “[i]n the event of a successful action and the award of costs”: clause 5 of the 2012 agreement as it specifically related to Mr C. In those circumstances, Mr C. agreed to reimburse SUEPO either the total costs incurred by SUEPO, or the remainder of the award of costs after Mr C.’s own costs (as substantiated by invoices) had been deducted, whichever was the smaller. This provision was obviously intended to operate in circumstances where the litigation had led to a judgment. The expression “award of costs” fairly clearly applies only when there was a judgment. Its objective was to enable SUEPO to recoup some or all of the monies it had paid in underwriting the litigation.

19. Clause 10(c) of the general agreement was to the same effect as clause 5 just discussed and required reimbursement, though this provision was expressed slightly differently, referring expressly to “[w]here the legal proceedings end with a judgment for the [member concerned] and costs are awarded [...]”. The general agreement went on to provide in clause 11 that if the claimant refused to reimburse SUEPO as provided in clause 10(c), SUEPO reserved the right to institute legal proceedings against the member concerned for the debt. The objective

of this clause was to ensure, if necessary by litigation between the member who had obtained the benefit of a judgment and SUEPO as the financier of the legal assistance, that SUEPO was able to recoup some or all of the monies it had paid in underwriting the legal assistance. This objective was allied with the objective of clauses 5 and 11 just discussed. Thus Mr C. had, in the present case, agreed to provisions that would result in him reimbursing SUEPO or being sued if he did not in the event that he was successful by securing a judgment in his favour together with an award for costs.

20. What the 2012 agreement (including the general agreement) did not address expressly was Mr C.'s obligations in relation to reimbursing SUEPO in the event that the grievance was resolved by agreement rather than by judgment. It is conceivable that the 2012 agreement, properly construed, was not intended to cover circumstances where litigation was settled by agreement and thus contemplated it would operate only when the litigation proceeded to judgment. If so, the remarks of the complainant in the contentious passage referred to in consideration 5 above were consistent with the way the 2012 agreement was intended to operate. That is to say, Mr C.'s legal expenses would not be met under the agreement because if the litigation was not resolved by a judgment, the agreement had no application. It is most likely, in those circumstances, Mr C. would be personally liable for the lawyers' fees and they could, if necessary, sue him to recover those fees. On this hypothesis the statement of the complainant did not constitute undue pressure.

21. It was a term of the 2012 agreement (including the general agreement) that it was governed by German law. It is unnecessary to delve into the question of whether, under German law, a term would be implied into the contract to fill the possible lacuna referred to in the preceding consideration. But if it was, it most likely would be to the same general effect with the same consequence concerning the characterisation of the complainant's conduct discussed in that consideration.

22. In all the circumstances, the complainant's conduct the subject of the first charge could not reasonably have been characterised as the application of "undue pressure". The complainant may have been wrong, as a matter of law, because the implied term just discussed did not operate precisely as she suggested. But it would operate much along the lines she suggested. Her conduct was, in the circumstances, reasonable conduct for a staff union representative seeking to protect the resources of SUEPO that were to be used, in part, to fund the legal assistance given to Mr C. It did not and could not constitute misconduct let alone serious misconduct. Both the Disciplinary Committee and the President erred in law in characterising her conduct in this way.

23. The complainant should not have been found guilty of the first and second charges. Nor, as a consequence, should the disciplinary sanction have been imposed.

24. It is unnecessary to deal with the other arguments of the complainant summarised in consideration 10 above.

25. In the circumstances, the Tribunal is satisfied it can resolve the complaint adequately and fairly without the oral hearing sought by the complainant. That request is rejected. Nor is it necessary to deal with the complainant's request for the production of documents given that the matter is resolved in her favour without them.

26. In the result, the impugned decision will be set aside. The complainant is entitled to be restored with retroactive effect to the grade and step she would have held but for the imposition of the disciplinary sanction, with all legal consequences. Interest will accrue at the rate of 5 per cent per annum on the resulting remuneration arrears from due dates until the date of payment. She is also entitled to moral damages, which are assessed in the sum of 25,000 euros. Exemplary damages, as sought by the complainant, are not warranted. The complainant is entitled to costs, which the Tribunal assesses in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The EPO shall restore the complainant with retroactive effect to the grade and step she would have held but for the imposition of the disciplinary sanction, with all legal consequences.
3. The EPO shall pay interest on the resulting remuneration arrears at the rate of 5 per cent per annum from due dates until the date of payment.
4. The EPO shall pay the complainant moral damages in the sum of 25,000 euros.
5. The EPO shall pay the complainant costs in the sum of 8,000 euros.
6. All other claims are dismissed.

In witness of this judgment, adopted on 8 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

YVES KREINS

DRAŽEN PETROVIĆ