

D.
v.
EPO

132nd Session

Judgment No. 4415

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. D. against the European Patent Organisation (EPO) on 13 March 2018 and corrected on 18 April, the EPO's reply of 28 August, the complainant's rejoinder of 29 November, corrected on 10 December 2018, and the EPO's surrejoinder of 25 March 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 contests the decision to impose upon him the disciplinary measure of dismissal for misconduct.

The complainant joined the European Patent Office, the EPO's secretariat, at its branch in The Hague in 2003. He was subsequently diagnosed with a chronic illness which, by 2013 at the latest, was causing him severe pain. In order to alleviate the pain, his doctors prescribed him a combination of painkillers, including medicinal cannabis. Over time, the complainant's health condition deteriorated and in February 2016 Dr M., the medical practitioner nominated by the President to examine the complainant's case, placed the latter on sick leave until 31 December 2016. In a medical opinion dated 12 September 2016, Dr M. assessed the complainant's incapacity for work at 100 per cent until 30 September 2016 but approved his reintegration in the workplace

with reduced working time as from 1 October 2016. By a letter of 19 September 2016, the complainant was requested to reintegrate in the Office starting on 1 October 2016. Further to a second medical opinion, however, it was decided to suspend his reintegration and to reassess the matter. The complainant was notified of this decision by email but, as he did not receive the email in time, he reported for work on 3 October and walked into the meeting scheduled to discuss his reintegration plan.

On 10 October 2016 the Investigative Unit received allegations of possible misconduct on the part of the complainant, consisting in the introduction and/or use of controlled substances (cannabis) in the Office. On 19 October 2016 the complainant was informed that an investigation was under way and he was invited to an interview scheduled for 21 October 2016. This interview was subsequently cancelled as the complainant was unable to attend due to his health condition. On 12 December 2016 he was provided with a summary of findings which concluded that (i) he had stored in his office cannabis and an electric inhaler without medical or other justification and that (ii) he had appeared at a work meeting under the heavy influence of drugs, without medical or other justification, rendering him unable to participate in that meeting. He was invited to submit a written response, which he did through his representative on 19 December 2016.

On 19 January 2017 the Head of the Investigative Unit notified the complainant that the Unit was reviewing additional allegations of misconduct, which consisted in his failure, without medical or other justification, to appear at work on 19 October 2016 (unauthorised absence). The complainant was invited to an interview scheduled for 31 January 2017. A summary of findings was provided to him on 20 February 2017 and he provided his comments thereon, through his counsel, on 28 February 2017.

On 16 March 2017 he was informed that the Investigative Unit was reviewing yet further allegations of misconduct on his part. This time the allegations consisted in his deliberate misrepresentation of his work product in the EPO's electronic system in an attempt to conceal a significant backlog and his productivity level. According to a summary of findings provided to him on 6 April 2017, the complainant had recorded in 2013 communications for 18 patent application files in the EPO electronic system without, nevertheless, drafting these

communications, including them in the physical files and sending them to Patent Administration for further processing.

In a medical opinion of 4 May 2017, Dr L., another medical practitioner nominated by the President to examine the complainant's case, assessed the complainant's incapacity at 100 per cent until 12 May 2017.

On 7 June 2017, the complainant was suspended from service and was banned from the EPO premises.

On 12 June 2017 the Administration initiated disciplinary proceedings against the complainant. A report under Article 100 of the Service Regulations was forwarded to the Chairman of the Disciplinary Committee. The complainant was relevantly informed by a letter of the same date.

Having held a hearing on 3 and 4 July, the Disciplinary Committee recommended by a majority, in an opinion dated 4 July 2017, the disciplinary measure of dismissal. A minority of the Committee's members recommended that the disciplinary measure of downgrading be considered "without any view to reintegration". Having received a copy of the Disciplinary Committee's opinion, the complainant provided his comments thereon, through his counsel, on 19 July 2017.

By a letter of 1 August 2017, the President of the Office informed the complainant of his decision to follow the Disciplinary Committee's majority opinion and to apply the sanction of dismissal. This measure would have immediate effect and the complainant would be paid compensation in lieu of the statutory period of notice. On 30 October 2017 the complainant requested a review of that decision but, by a letter of 12 December 2017, the President rejected his request for review. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to reinstate him in a position at the level he occupied prior to the disciplinary proceedings and to order the EPO to remove from his personnel file any evidence of or reference to the disciplinary proceedings. He claims reimbursement of all lost income and benefits, including any future loss of accrued pension rights incurred either directly or indirectly as a consequence of the impugned decision. He also claims reparation for the loss of possibility for career progression since his suspension and moral damages calculated at 50 per cent of the total amount of material damages awarded, together with interest. He seeks reimbursement of all legal costs incurred by him during the disciplinary proceedings, the management review process and the present proceedings before the Tribunal. He also seeks interest at the rate of 5 per cent per annum on

all amounts awarded by the Tribunal from the date they become due until the date such amounts are paid. He asks the Tribunal to award him such other relief it may find to be just, fair and appropriate.

The EPO asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS

1. The complainant commenced employment with the EPO in 2003. By a decision of the President communicated to him by letter dated 1 August 2017, he was dismissed effective that day. The dismissal was a disciplinary measure for misconduct of the complainant established to the President's satisfaction. That decision was affirmed in a subsequent review by a decision of the President communicated to the complainant by letter dated 12 December 2017. That latter decision is impugned in these proceedings.

2. There is, and has been at relevant times, no dispute that the complainant has been, since no later than 2006 and until the time of his dismissal and beyond, suffering from ankylosing spondylitis (a form of arthritis/inflammation of the joints of the spine) which has resulted in the use of medication (including medicinal cannabis) to enable the complainant to deal with the significant pain generated by that condition. Without descending into details, the misconduct founding the decision to dismiss the complainant generated two sets of charges.

3. The first set concerned events in 2016 involving the complainant allegedly attending an "official reintegration meeting" at the workplace while intoxicated by cannabis, later using and storing cannabis on the EPO's premises and taking a day of "uncertified sick leave due to the use of [cannabis]" and remaining away from work on unauthorised absence for several more days, although he had by then already reached the maximum number of uncertified sick leave days in a year.

4. The second set concerned events in 2013 involving the complainant allegedly making false and misleading entries into an electronic data system about work purportedly done by him on a number of files on which he was to work.

5. In his pleas the complainant raises a multitude of procedural and substantive issues attending events leading up to the charges, consideration of the charges and the ultimate decision making resulting in his dismissal. It is unnecessary to address each of them nor the corresponding responses of the EPO. That is because one matter raised by the complainant is decisive.

6. In the pleas in his brief, the complainant raises the issue of the failure of the President in the impugned decision “to appropriately take into account [his] health status [...] in determining the appropriate sanction”. The initial decision of the President to dismiss the complainant in August 2017 had been preceded by a consideration of the charges by a Disciplinary Committee which provided a reasoned opinion dated 4 July 2017. The President relied on this opinion for both his initial decision to dismiss the complainant and the impugned decision.

7. The Disciplinary Committee’s members were divided in their opinion as to what was an appropriate disciplinary measure. A majority recommended the disciplinary measure of dismissal while the minority considered that “in view of the medical situation of the [complainant], his behaviour must not be assessed in a way comparable to healthy employees and recommend[ed] that a sanction of downgrading be considered without any view to reintegration”. Though a minority view, this commentary should have alerted the President to the need to consider with some care the relevance of the complainant’s health.

8. Indeed, earlier in the opinion, the Disciplinary Committee, speaking as a whole, made an important comment. Under a general heading of “RECOMMENDATION OF THE DISCIPLINARY COMMITTEE”, a subheading “Considerations” and, importantly, a sub-subheading “Mitigating circumstances”, the Disciplinary Committee said:

“In the 2nd half of 2013 it cannot be excluded that [the complainant’s] medical condition played a role in his sequence of actions related to the 2nd set of charges.”

9. In the initial decision of 1 August 2017 to dismiss the complainant, the President said:

“[I]n general, with regard to the medical aspects of the case, and considering your defence, the Office maintains that **none of the incidents has been attributed to your medical condition in a direct or unavoidable manner,**

such that would be beyond your powers. All expert witnesses attributed it rather to your lack of cooperativeness and your disregard for the Office's rules and for its efforts to reintegrate you smoothly. It is repeated that while your medical condition is not contested, none of the witnesses you named to your defence, nor your own treating physician, neither any medical certificate nor other attest[ation] have been submitted to substantiate even in part any of your defence statements." (Emphasis added.)

10. The sentiments of the above passage are repeated in the impugned decision of 12 December 2017 and the emphasised words actually repeated but with the word "charges" substituted for "incidents". Moreover, as a general comment, earlier in the letter of 12 December 2017, the President said "in this case, there were no mitigating circumstances that would have enabled the Office to apply a less severe sanction [than dismissal]". This last-mentioned comment is entirely dismissive of the completely reasonable view expressed by the minority of the Disciplinary Committee's members.

11. The approach of the President discussed in the preceding two considerations is responsive to the argument of the complainant's counsel, illustrated by the following passage in paragraphs 108 and 109 of the complainant's defence filed before the Disciplinary Committee responding to the report submitted under Article 100 of the Service Regulations:

"108. The [r]eport disappointingly concludes that the Office considers there to be no mitigating circumstances whatsoever. This appears to ignore the principal factor which is the chronic health situation of the [complainant].

109. Simply put, the [complainant]'s health condition, and his treatment by EPO sanctioned doctors, is at the heart of the allegations in the [report submitted under Article 100 of the Service Regulations]. In the absence of his illness, the [complainant] would have been able to complete the communications that he had entered into the electronic system. Furthermore, he would not have needed to take powerful medically prescribed medical cannabis and opioids to treat the pain from his chronic condition. Finally, he would also not have been sick on 19 October and/or unable to attend the reintegration plan, even though it had been cancelled, on 3 October."

12. In appropriate cases, the health of a staff member who is the subject of disciplinary proceedings can be a mitigating factor (see, for example, Judgments 4051 and 3602) but not always (see, for example, Judgment 1984). It was in the present case. The need for the complainant

to have recourse to medicinal cannabis is certainly relevant to the first set of charges. The meaning of the emphasised words in consideration 9, above, is far from clear. But their import appears to be that the complainant would have been aware of the consequences of his actions, notwithstanding his medical condition, the pain it generated and the need to lessen or eliminate that pain. But his medically sanctioned recourse to medicinal cannabis plainly feeds into the question of the degree or extent of his culpability for attending the EPO premises under the influence of that drug and, indeed, consuming or storing that drug on those premises.

13. While the nexus between his health and his conduct the subject of the second set of charges is not as obvious, there is nonetheless one. In 2013 the EPO had acknowledged and accepted that the complainant could not, because of his ankylosing spondylitis, work full-time and was working reduced hours. It would have been an available inference that even while working reduced hours, the complainant was working under pressure generated, ultimately, by his compromised capacity to work. While the making of the false entries cannot be justified directly by reference to his health, their making can, in whole or in part, be explained by the circumstances in which he was then working.

14. The approach taken by the President to the question of the relevance of the complainant's health and whether there were any mitigating circumstances or factors was significantly flawed. The impugned decision rejecting the request for review of the decision to dismiss the complainant for misconduct will be set aside.

15. The complainant seeks an order of reinstatement. It is inappropriate to make such an order. The Tribunal accepts that the complainant's conduct is likely to have seriously compromised the trust between him and the EPO. To make an order reinstating the complainant would place both the complainant and the Organisation in a position where the material conduct founding the charges, or similar conduct, might be repeated. Additionally, the complainant himself admitted in his complaint brief that his illness has "dramatically impacted upon his ability to carry out his tasks as an employee of the EPO".

16. On the question of damages, the complainant is entitled to both material and moral damages. Because of his dismissal, he lost the opportunity at a young age to continue in employment with the EPO or to end his employment more favourably to him, including by obtaining an invalidity pension. Accordingly, material damages for this lost opportunity are assessed in the sum of 80,000 euros. The complainant is also entitled to moral damages, assessed in the sum of 40,000 euros, and an order for costs, which the Tribunal determines in the sum of 8,000 euros. The complainant seeks several consequential orders, including costs for the disciplinary proceedings and the management's review. Only one should be granted, namely that the evidence of and reference to the disciplinary proceedings and the disciplinary measure be removed from his personnel file.

DECISION

For the above reasons,

1. The impugned decision of 12 December 2017 is set aside.
2. The EPO shall pay the complainant 80,000 euros as material damages.
3. It shall pay the complainant 40,000 euros as moral damages.
4. It shall also pay the complainant 8,000 euros in costs.
5. It shall remove from the complainant's personnel file all evidence of and reference to the disciplinary proceedings and the disciplinary measure.
6. All other claims are dismissed.

In witness of this judgment, adopted on 24 May 2021, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ