119th Session **Judgment No. 3430**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. B. against the European Patent Office (EPO) on 10 December 2010 and corrected on 12 January 2011, the EPO's reply dated 20 April and corrected on 25 May, and the complainant's rejoinder of 28 June 2011;

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 and the pleadings may be summed up as follows:

A. The complainant joined the EPO in 1990. On 25 July 2006 he filed a request for financial assistance under Article 87 of the Service Regulations, to which he appended a list of his debts. A few days later, he filed an addendum to that list, adding a debt to the Bank of Austria in connection with a loan he had taken out to purchase a flat, which he had in the meantime put up for sale through the bank. An attachment of earnings against the complainant had already been served on the EPO for that debt in May and again in June 2006, because he had failed to pay back the endowment policy taken out as collateral for that loan. On 13 October 2006 the EPO granted him an interest-free loan on condition that he would provide proof of repayment of all debts that the loan was intended to cover within 14 days, as well as proof of the proceeds from the sale of the flat as soon as it was completed.

On 2 October 2007 the complainant submitted a statement explaining why he had been unable to repay his debt to Mr H., though he had received the money for his repayment through the EPO loan. He promised to repay him as soon as possible. In November 2007 a second attachment of earnings against the complainant was served on the EPO, this time in respect of his debt to Mr H. In January 2008 the EPO received a third attachment of earnings against the complainant in connection with a debt for medical fees. On 25 February 2008 the complainant submitted a bank statement showing that he had ordered payment of the medical fees through a bank transfer. The payment, nevertheless, did not appear in the creditor's account. The complainant subsequently explained that he had been obliged to cancel the payment order shortly after submitting it, because he urgently needed to use the money for other payments that had in the meantime become due. He apologised and promised to pay the outstanding amount. On 10 July 2008 the EPO initiated disciplinary proceedings against the complainant and referred the case to the Disciplinary Committee for an opinion. It also suspended the complainant from duty with immediate effect.

On 14 August 2008 the Public Prosecutor of Munich communicated to the EPO a penalty order issued against the complainant for negligent money laundering. The EPO immediately referred this incident to the Disciplinary Committee. The Committee delivered its opinion on 15 December 2008, recommending by a majority that the complainant be downgraded. By a letter of 26 January 2009 the President of the Office informed the complainant of her decision to dismiss him under Article 93(2)(f) of the Service Regulations on the grounds that he had repeatedly failed to meet the standards of integrity befitting his office and that the bond of trust between him and the Organisation had been irretrievably broken. The complainant filed an internal appeal against this decision with the Internal Appeals Committee (IAC) which, in its opinion of 12 July 2010, recommended by a majority that the appeal be dismissed as unfounded. In a minority opinion, one member of the IAC recommended that the appeal be upheld and that the disciplinary measure of downgrading be applied to the complainant. By a letter of 9 September 2010, the President notified the complainant of her decision

to dismiss his appeal in line with the IAC's majority opinion. That is the impugned decision.

B. The complainant asserts that the disciplinary sanction of dismissal was neither proportionate nor appropriate. He contends that it was clearly out of proportion to the gravity of his misconduct because, although he failed to meet every single obligation he had assumed under the loan agreement with the EPO, his misconduct was not so grave as to warrant the imposition of the most severe disciplinary sanction. He considers that the Administration could have easily opted for a less severe sanction, especially in light of the fact that he had performed his duties satisfactorily throughout his 18-year career with the EPO. He adds that there was no intention on his part to cause any harm to the EPO and that the Organisation did not actually suffer any financial loss or damage as a result of his personal dealings.

In his opinion, the communication to the EPO of the penalty order issued by the Public Prosecutor was a very serious infringement of the procedure which the EPO ought to have followed in order to obtain such information. Indeed, only the Federal Foreign Office could have transmitted it to the EPO. As a result of this serious infringement, there is an absolute prohibition in using it as evidence in any court proceedings. In effect, it constituted inadmissible evidence in the disciplinary and internal appeal proceedings and it also constitutes inadmissible evidence in the proceedings before the Tribunal.

The complainant argues that the President of the Office did not provide sufficient grounds for her decision not to follow the majority opinion of the Disciplinary Committee to apply to him the sanction of downgrading. He emphasises that he always repaid his debt to the EPO and that for every single instance of failure to fulfil his obligations under the loan agreement, he was able to give an explanation by reference to his difficult personal and financial circumstances. He explains that he did not deliberately neglect his obligations but that, as often occurs with heavily indebted persons, he had difficulty maintaining an overview of his debts. He draws attention to the very serious consequences that his dismissal has for himself and his family, since as an EPO employee he is

not entitled to unemployment benefits under the German system and, given his age, he is not likely to be able to find another job.

He asks the Tribunal to set aside the decision of 26 January 2009 by which the President dismissed him as well as the decision of 9 September 2010 by which she rejected his internal appeal. He requests that the EPO be ordered to re-employ him with effect from 1 June 2009 under the same conditions as before or, subsidiarily, at a lower grade, and to pay his salary for the period from 1 June 2009 until the date of his re-employment. He also claims costs.

C. In its reply the EPO argues that the complaint is irreceivable *ratione temporis*, because the complainant failed to file his complaint within the statutory time limit. Although he received the President's final decision on 10 September 2010, he only filed his complaint on 10 December 2010, i.e. beyond the 90-day time limit prescribed in the Tribunal's Statute. This being so, it is immaterial that his counsel received the final decision on 13 September 2010.

Emphasising that the choice of a disciplinary measure lies within the discretion of the President, the EPO argues that dismissal was in the complainant's case fully justifiable. Indeed, the complainant was found by both the Disciplinary Committee and the IAC to have committed repeated violations of the Service Regulations, in particular by providing false information on his financial situation, failing to observe the conditions of the loan agreement, making fraudulent misrepresentations and engaging in money laundering. Moreover, he exhibited a blatant disregard towards the EPO both prior to and during the disciplinary and internal appeals procedures. In short, his conduct time and again severely damaged the EPO's confidence in him and demonstrated a lack of the required integrity. The fact that his performance had been satisfactory is irrelevant to the question of whether his conduct warranted a disciplinary sanction.

With regard to the penalty order issued by the Public Prosecutor, the Organisation contends that it is both admissible and relevant evidence. It points out that the restrictions on the admissibility of evidence encountered in national jurisdictions have no place in proceedings

before an international tribunal. It explains that Articles 19 and 20 of the Protocol on Privileges and Immunities of the EPO establish a reciprocal duty of judicial cooperation which aims at preventing any abuse of the privileged status enjoyed by staff members. Consequently, the EPO was allowed to receive and to rely on information communicated by the Public Prosecutor and it is immaterial if such information was also communicated to the Federal Foreign Office. It adds that the complainant's conviction for money laundering, notwithstanding the low amount it involved, was relevant because it concerned his character, his integrity and his general fitness for the international civil service.

According to the EPO, the President properly explained the reasons for her decision to dismiss the complainant. Indeed, in her letter of 26 January 2009, she emphasised that the Disciplinary Committee's findings amounted to very serious breaches of the complainant's duties under the Service Regulations, that the complainant had repeatedly failed to meet the standards of integrity befitting his office and that he had broken the Office's trust in him. Although the EPO made sustained efforts to assist him and even took financial risks to that end, he failed to show any real contrition and he repeatedly offered unacceptable explanations.

D. In his rejoinder the complainant asserts that the President's final decision was delivered to him on 11 September 2010 and that his complaint was filed on 10 December 2010, i.e. within the 90-day time limit provided for in the Tribunal's Statute. Accordingly, it is receivable *ratione temporis*. He also notes that the President's final decision was delivered to his legal representative on 13 September 2010.

CONSIDERATIONS

1. The complainant impugns the decision, dated 9 September 2010, by which the President accepted the recommendation by a majority of the IAC to dismiss the complainant's internal appeal against his dismissal from his employment for misconduct. The President had dismissed him, without reduction of his retirement pension, by letter dated 26 January 2009, on the grounds that he had repeatedly failed to

meet the standards of integrity befitting his office and that his actions had irretrievably broken the bond of trust between him and the EPO.

2. The EPO raises receivability as a threshold issue. It submits that the complaint is out of time because it was filed on 10 December 2010, which was outside the 90-day time limit provided for in Article VII, paragraph 2, of the Tribunal's Statute. On balance, it appears that the complainant received the impugned decision on 11 September 2010. That is the date of notification from which the 90 days are to be counted. The complaint was filed on the ninetieth day after the complainant was notified of the impugned decision. It is accordingly receivable as it was filed within the time limit.

3. According to firm and consistent precedent, a disciplinary authority has a discretion to determine the severity of a disciplinary measure justified by a staff member's misconduct, provided that the measure adopted is not manifestly out of proportion to the offence according to both objective and subjective criteria. Where such a decision lacks proportionality, there is an error of law which warrants setting aside the impugned decision (see Judgment 2944, under 50, and the judgments cited therein).

4. The complainant does not deny the allegations which provided the bases for the imposition of the disciplinary sanction. He contends, however, that the President's decision to dismiss him is the most severe disciplinary measure under the Service Regulations and should only be taken in the most serious of cases. He contends that the decision to dismiss him was neither proportionate nor appropriate because there are mitigating circumstances in his case, which, had they been properly considered, would have led to the imposition of the lesser measure of downgrading pursuant to Article 93(2)(e) of the Service Regulations, as the majority of the Disciplinary Committee and a minority of the IAC had recommended.

5. The Tribunal reiterates that a decision to dismiss a staff member is to be made with reference to all of the circumstances of the

particular case, including those in mitigation. In a sense, there are two critical questions in this case. The first is whether the proved impeachable actions by the complainant were such that they did not meet the requirements of an international civil servant, thereby severely damaging the bond of trust and confidence between him and the EPO. If the answer is in the affirmative, the second question is whether dismissal is an appropriate remedy and also whether there are factors that would render dismissal disproportionate in the sense that it would be out of all proportion according to both objective and subjective criteria. In the case of a dismissal the closest scrutiny is required (see Judgment 2656, under 5).

6. The Disciplinary Committee and the IAC found that very serious allegations against the complainant were proved. They are chronicled in part A of the background facts.

7. With regard to the summary punishment which the complainant incurred on the charge of negligent money laundering, he argues that the Public Prosecutor's Office wrongly transmitted the information directly to the EPO by letter. He insists that the information could only have been sent to the EPO by the Foreign Service. He therefore asserts that the criminal conviction was inadmissible in the disciplinary proceedings, and, accordingly, the President unlawfully used it as a ground to determine that he lacked integrity and reliability. The Tribunal finds, in the first place, that there is no rule or principle that prevents the transfer of the information to the Office in the manner in which it was transferred. Neither is there any rule or principle which rendered that information inadmissible in the disciplinary proceedings.

8. It might appear that, in the impugned decision the President accorded disproportionate weight to the money laundering aspect of the case when she stated that she considered that this severely breached the Office's trust in the complainant as well as the highest standard of integrity. This statement should however, be seen in its context. It was the President's explanation as to why she did not agree with the finding of the minority of the IAC that dismissal would be disproportionate

because the money laundering matter was an isolated incident and concerned only a small sum of money. The President then gave other reasons for not accepting the minority recommendation to downgrade the complainant. She noted, in particular, that the cases on which the minority relied as bases for finding that dismissal was disproportionate were cases in which the alleged misconduct was not established. In accepting the recommendation of the majority of the IAC, the President adopted their analysis of the allegations and the mitigating circumstances, which the complainant had amply detailed. These were similar to the mitigating factors which the Disciplinary Committee had previously considered when its majority had also recommended downgrading pursuant to Article 93(2)(e) of the Service Regulations, instead of dismissal. They made that recommendation on the ground that dismissal would be justified only in a case of imprisonment after a criminal conviction; in the case of a violent assault on an employee of the Office or for activity that resulted in financial loss for the Organisation. The President detailed her reasons for rejecting this recommendation, explaining that the statement was an inaccurate statement of the case law in light of decisions by the Tribunal which have upheld dismissals on various other grounds.

9. In his mitigating plea, while the complainant admits that he made "a mistake", he states that he did not intend to damage the EPO by his actions. He states that his 18 years of committed service to the EPO, his age, his family and financial commitments and the financial hardships, which dismissal will have on him and his family, should be taken into account. He further states that as an EPO staff member he had no unemployment insurance. He points out that the EPO did not suffer any financial damage on account of his personal dealings. He always eventually repaid his debts and provided plausible explanations for each instance on which he failed to fulfil his obligations under loan agreements by reference to his personal and financial difficulties. He did not deliberately neglect his obligations and always apologised for his actions.

10. These are important considerations. The majority of the IAC, whose opinion and recommendation the President adopted, considered them. The President explained why she did not accept the decision by the minority to downgrade the complainant. The Tribunal finds no basis on which to impeach the exercise of her discretion to dismiss the complaint, as it was not manifestly out of proportion to the degree of seriousness of the proved allegations. The President did not exceed her discretionary authority. In the premises, the complaint is unfounded and will accordingly, be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 November 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 11 February 2015.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ