C.

v.

EPO

125th Session **Judgment No. 3953**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms B. B. C. C. against the European Patent Organisation (EPO) on 15 December 2014 and corrected on 21 December 2014, the EPO's reply of 14 April 2015, the complainant's rejoinder of 27 July and the EPO's surrejoinder of 8 October 2015;

Considering Article II, paragraph 5, 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 impugns the decision to impose upon her the disciplinary measure of downgrading and to recover from her undue payments through monthly deductions from her salary.

The complainant, who joined the EPO in 1989, held grade B4 at the material time. On 7 March 2005 she applied for a rent allowance under Article 74 of the Service Regulations for permanent employees of the European Patent Office. In the "Declaration concerning rent allowance" which she submitted when applying for the allowance, she answered "no" to the questions "[d]o you receive a rent allowance from other sources?" and "[d]oes the rent [of your apartment] relate to persons other than yourself and members of your family?" She also certified that the information she had provided was true and she undertook to

"notify any changes immediately". The complainant was granted a rent allowance as of April 2005. On 1 April 2005 the complainant's partner moved into her apartment and started giving her 500 euros per month as a contribution to their shared household expenses. This arrangement continued until mid-February 2010 (facts relevant to Apt. A).

On 19 March 2010, having separated from her partner, the complainant moved into a different apartment and applied again for a rent allowance. Her application was approved and she was granted the allowance as of April 2010. Between 28 August 2010 and 26 March 2011 she intermittently sublet part of her apartment to third parties on a "bed and breakfast" basis (facts relevant to Apt. B). During part of this period, from 6 September 2010 until 23 January 2011, she was on sick leave.

In January 2012, further to allegations that the complainant had improperly received a rent allowance and had pursued a supplementary activity without the EPO's permission, the Administration initiated disciplinary measures against her. Having held a hearing on 6 March 2012, the Disciplinary Committee issued its opinion on 2 May 2012. It found that the complainant had breached Articles 14(2), 16(1), 62(1) and 74(8) of the Service Regulations, as well as the provisions of Circular No. 135. Noting that the complainant sought to explain her actions by referring to her impaired health condition, the Disciplinary Committee observed that it was not in a position to assess the complainant's state of health, but that in any case it could not see a causal connection between her state of health and the paid supplementary activity. The Committee unanimously recommended that the complainant be downgraded to grade B2, step 5, pursuant to Article 93(2)(e) of the Service Regulations.

By a letter of 1 June 2012 the President informed the complainant that he had decided to endorse that recommendation and to implement it with effect from 1 July 2012, without prejudice to other decisions which might be taken "for the restitution of the Office's damage". The following day, on 2 June 2012, the complainant was informed that the Administration proposed to recover from her a total amount of 9,000 euros – corresponding to overpaid rent allowances – through the deduction from her salary of 380 euros per month, "for the full and final

closure of the matter". By an e-mail of 2 July 2012, the complainant's counsel accepted this arrangement on behalf of the complainant.

On 21 August 2012 the complainant filed an internal appeal requesting reassignment to her previous grade (grade B4, step 12), reimbursement of the amounts deducted from her salary as from 1 July 2012, and costs. The internal appeal was referred to the Internal Appeals Committee (IAC). The IAC held a hearing on 12 February 2014 and issued its opinion on 27 June 2014, recommending by a majority that the complainant's appeal be rejected as unfounded. By a letter of 15 September 2014, the Vice-President of Directorate-General 4, acting on behalf of the President, informed the complainant that he had rejected her internal appeal as unfounded. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision ab initio, to reassign her with retroactive effect to grade B4, step 12, to pay her the corresponding salary arrears, with interest, and to reimburse her the amounts deducted from her salary in respect of allegedly overpaid rent allowances, likewise with interest. She also claims moral damages and costs.

The EPO invites the Tribunal to dismiss the complaint as unfounded in its entirety.

CONSIDERATIONS

1. The complainant filed the present complaint against the 15 September 2014 decision of the Vice-President of Directorate-General 4, taken by delegation of power from the President of the Office, endorsing the recommendation made in the IAC majority opinion to reject her internal appeal as unfounded.

2. The complainant had filed her internal appeal against the President's 1 June 2012 decision to endorse the 2 May 2012 unanimous recommendation of the Disciplinary Committee to downgrade the complainant to grade B2, step 5, in accordance with Article 93(2)(e) of the Service Regulations, as a disciplinary measure proportionate to the acts committed and the complainant's degree of culpability. In his

1 June 2012 decision the President also expressly reserved the EPO's right to seek compensation for the damage suffered by the Office by way of a separate decision, as the Disciplinary Committee had unanimously concluded that the EPO had incurred a loss in the range of 8,000 to 12,880.15 euros for overpayments of rental subsidies, and could recover the amount under Article 88 of the Service Regulations.

3. In its opinion, dated 2 May 2012, the Disciplinary Committee stated inter alia that it considered it "established that the [complainant] applied for and improperly received a rent allowance between April 2005 and March 2010 for the apartment at [street address of Apt. A] which she rented from 10 March 2005, and that she infringed Article 74(8) of the Service Regulations by failing to inform the Office of the circumstance, which was relevant to the grounds for granting the allowance and to the amount thereof, that, contrary to her 7 March 2005 'Declaration concerning rent allowance', the rent for the apartment related to a third party who was not a member of her family, i.e. her then partner, who shared the flat with her from April 2005 and from whom she also received monthly payments". Referring to the complainant's subletting of her apartment (Apt. B) to third parties, the Disciplinary Committee stated that it considered it "proven that the [complainant], in the period between August 2010 and March 2011, intermittently sublet on a commercial 'bed and breakfast' basis part of the apartment at [street address of Apt. B] , for which she was receiving a rent allowance; that she failed to obtain the Office's approval for this secondary activity; and that she also pursued the secondary activity while she was on sick leave (from 6 September 2010 to 23 January 2011)". The Disciplinary Committee unanimously found that the complainant's misconduct warranted downgrading to grade B2, step 5, as "the severest available disciplinary measure which is proportionate to the acts committed and the degree of culpability", and that it was "up to the Office to assess the requirements for repayment of the rent allowance as granted and paid to the [complainant], and to determine the reasons for repayment and the relevant amount" in accordance with the provisions of Article 88 of the Service Regulations.

4. The complainant was notified by a letter dated 2 June 2012 that the Office proposed to recover a total amount of 9,000 euros through monthly deductions of 380 euros from the complainant's salary "for the full and final closure of the matter and with the aim to restrict the overall financial hardship which [the complainant] will incur". The complainant's legal counsel sent an e-mail on 2 July 2012 indicating that the complainant had accepted that proposal.

5. The IAC's majority opinion, dated 27 June 2014, recommended rejecting the appeal "as unfounded on the merits because the recommendation of the [Disciplinary Committee] contained no error of law or assessment and, by following the unanimous recommendation of the [Disciplinary Committee], the decision of the President contain[ed] no misuse of power. The [complainant] breached her duty under Art. 74(8) [of the Service Regulations] by not informing the Office that the situation, whether the rent related to persons other than herself, had changed. The [Disciplinary Committee] was not obliged to request a medical expertise because there were no prima facie hints that the [complainant's] health condition could possibly have reduced her accountability for not informing the Office of her running a ['bed and breakfast']." A two-member minority recommended that the President's decision be set aside and that the complainant's legal costs be reimbursed. In separate minority opinions, one member recommended termination of the recovery measures and reimbursement of the amounts already recovered, and another member recommended that the case be reheard by the Disciplinary Committee.

6. In the present complaint, the complainant focuses on her obligations under the Service Regulations, and underlines how her health situation affected her decision-making. Specifically, with respect to the first issue (regarding Apt. A), she claims that she was entitled to the rent allowance but was not required to notify the Office regarding her then partner, as he was not listed on the rental contract and "for her he was family". She adds that the 500 euros per month that he paid to her for living expenses did not count as "rent allowance from other sources", which can only refer to payments received from a public

authority or a private company based on the wording of the English, French and German versions of point 3 of the "Declaration concerning rent allowance". She submits that the President's decision, based on the reasoning of the Disciplinary Committee, is tainted with illegality and thus must be quashed, the recovery of amounts already paid as rent allowance must be stopped, and any amounts already recovered must be reimbursed. With regard to the second issue (regarding Apt. B), she submits that the supplementary activity was very limited in time, that the total financial benefit was not more than 2,000 euros and that the activity was carried out predominantly during her period of sick leave between 6 September 2010 and 23 January 2011. She furthermore states that her "serious psychological impairment" excluded or, at least, considerably reduced her responsibility with regard to both issues, and asserts that by not seeking an expert medical opinion to establish whether at the material time her medical condition excluded or reduced her responsibility, the Disciplinary Committee failed to fulfil its "inquisitorial duties". The complainant states that the minority opinion rightly considered that the Disciplinary Committee "acted in spite of its lack of competence and failed to take relevant facts into account".

7. The complaint is unfounded. On 7 March 2005 the complainant signed a "Declaration concerning rent allowance" (for Apt. A) certifying the amount of monthly net rent paid; that she did not own accommodation in the area of her employment; that she did not receive a rent allowance from other sources; that the rent did not relate to persons other than herself and members of her family; and that the above details were true, and she undertook to notify the EPO immediately of any changes. After moving into a new apartment (Apt. B), she signed another "Declaration concerning rent allowance" on 19 March 2010, certifying the same elements as those certified in the 7 March 2005 Declaration.

8. At the material time, Article 74 of the Service Regulations, entitled "Rent allowance", provided, in relevant part:

> "(1) A rent allowance shall be payable to a permanent employee Grade A1 or A2 or in Category B or C provided that:

(a) neither he nor his spouse owns, in the area of the place of his employment, accommodation commensurate with his grade and family circumstances;

(b) he is the tenant or sub-tenant of furnished or unfurnished premises commensurate with his grade and family circumstances;

(c) the rent paid, excluding all charges, exceeds the proportion specified in paragraph 4 below of his emoluments as defined in the first sub-paragraph of paragraph 6.

[...]

(3) Permanent employees shall supply the President of the Office on request with all information necessary to ensure that the conditions referred to in paragraph 1 are satisfied and to determine the amount of allowance to which they are entitled.

[...]

(8) All permanent employees in receipt of a rent allowance shall inform the President of the Office in writing immediately of any change which affects their eligibility for the allowance."

9. By signing the 7 March 2005 and the 19 March 2010 Declarations, the complainant fulfilled the requirements of Article 74(3) of the Service Regulations. However, by failing to notify the EPO of the changes to her living situation (i.e. her five-year cohabitation in Apt. A with her partner, beginning two weeks after signing the first declaration, and subletting part of her second apartment, Apt. B, for commercial purposes from 28 August 2010 until 26 March 2011), she breached the requirement of Article 74(8), as implemented by the "Declaration concerning rent allowance."

10. The Tribunal notes that the complainant's arguments regarding the issue of whether she was required to notify the Office that in April 2005 her partner moved in with her and started contributing to the household expenses, are flawed. The arguments that her partner was "family" to her and that his name was not on the lease have no legal basis. Point 4 of the Declaration reads: "[d]oes the rent [of your apartment] relate to persons other than yourself and members of your family?" The meaning of the term "family" is defined by law and not according to subjective criteria or individual perceptions. The complainant had an obligation to notify the EPO of any non-family member living in the

apartment. The complainant objects that the EPO, with its requirement to be informed, would intrude upon her private life in violation of the fundamental right to respect private and family life. This argument is without merit. The complainant filled out and signed the "Declaration concerning rent allowance" on 7 March 2005, thereby assuming the obligations arising from Article 74 of the Service Regulations. The consequent obligation to notify the Office of any changes aimed at guaranteeing the proper use of the rent allowance. Furthermore, with respect to Apt. A, the complainant alleges that in a similar case the EPO acted differently. However, the objection is unfounded. By failing to notify the EPO that the rent she was paying for Apt. A did not only relate to her as from April 2005, when her partner moved into the apartment, although she had certified on 7 March 2005 that she would notify "any changes" immediately, the complainant breached the rules governing the granting of the rent allowance, unjustly benefiting, and, hence, the principle of equality cannot be applied, as there can be no equality in illegality.

11. At the material time, Circular No. 135 of 14 June 1999, amending Article 14 of the Service Regulations, read in relevant part:

"**Acceptance of payment by**
permanent employees of the European Patent Office

- Regulations supplementing Article 14(2) of the Service Regulations -

(1) Requests for approval of a supplementary activity for which payment is made must be submitted to the President via personnel department.

(2) In the case of supplementary activities of any kind (such as lecturing, teaching or writing), acceptance of payment by the permanent employee will generally be allowed if

- the activity (including any preparation and travel time) takes place outside working hours and
- the Office incurs no costs (e.g., travel or subsistence expenses) from it."

12. According to the provisions of this Circular, the complainant was required to request approval prior to initiating her commercial activity (i.e. subletting part of her Apt. B as a "bed and breakfast"). She did not do so. The EPO was paying the complainant a rent allowance

for an apartment which, it believed, was only occupied by the complainant, who, it believed, was not in receipt of further rental subsidy. Considering that she then used that apartment to base her commercial activity without requesting prior approval, the complainant violated also the provision in paragraph 1 of the Circular.

13. Regarding the question of the complainant's health condition and the Disciplinary Committee's failure to seek an expert medical opinion, the Tribunal notes that the Disciplinary Committee took account of the complainant's state of health as a mitigating factor when deciding the proportionality of the recommended sanction. The Tribunal finds that the complainant's fragile state of health did not justify her failure to notify the EPO of the relevant changes resulting from her cohabitation with her partner in Apt. A, as she worked regularly in that five-year period and the requirement of notification was a matter of submitting a simple written notification. With regard to Apt. B, the Tribunal considers that, as the complainant was able to run a "bed and breakfast", which implied material and legal activities, as well as to reapply for the rental allowance, she should have been capable of notifying the EPO of the changes to her housing situation and of requesting permission for the supplementary activity.

14. Regarding the severity of the imposed sanction, the Tribunal recalls that, according to a long line of precedent the decision-making authority has discretion in determining the severity of a sanction to be applied to a staff member whose misconduct has been established. However, as stated in Judgment 3640, under 29 and 31, that discretion must be exercised in observance of the rule of law, particularly the principle of proportionality. In the present case, the complainant's downgrading was not disproportionate to her misconduct. The complainant took financial advantage from the contested unlawful conduct with which she was charged and which was established. This is a serious breach of the duty of honesty incumbent on international civil servants and her state of health has no bearing on the merits of the impugned decision. In light of the above considerations, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 25 October 2017, 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 24 January 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ