C.

v.

EPO

125th Session **Judgment No. 3962**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms J. C. against the European Patent Organisation (EPO) on 7 August 2015 and corrected on 16 October 2015, the EPO's reply of 18 February 2016, the complainant's rejoinder of 27 May and the EPO's surrejoinder of 7 September 2016;

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 challenges the decisions to downgrade her, reassign her to another position and place her on an additional period of probation.

The complainant joined the European Patent Office, the EPO's secretariat, as an examiner at grade A2 in April 2002, and in September 2003 she was promoted to grade A3. In January 2007 she consulted the EPO Occupational Health Service (OHS) and, on the basis of health issues, she was placed on a reintegration plan with retroactive effect to June 2006. The OHS placed her on a new reintegration plan in 2010 (which provided for, among other things, a reduced productivity target). In April 2012 her treating physician reported that she was suffering from a chronic illness that, despite treatment, was not fully cured.

The physician advised that further treatment was needed (at that time the complainant did not show the medical certificate provided by her physician to either the OHS or to her Director). The complainant's reintegration plan was terminated in September 2012 and shortly thereafter she stopped regular treatment with her physician.

In 2013 the complainant was given a reduced productivity target by her Director which was agreed to by her Principal Director. The OHS was not consulted. In the meantime, she received an overall rating of "less than good" for her staff reports for the periods 2008-2009, 2010 and 2011. She then received an overall rating of "unsatisfactory" for the reporting periods 2012, 2013 and the first half of 2014.

In October 2014 the complainant received a report under Articles 52(2) and 100(1) of the Service Regulations for permanent employees of the European Patent Office (the Report) written by the Principal Director of Human Resources, in which it was stated that the preconditions for applying Article 52 of the Service Regulations (professional incompetence) to the complainant had been fully met and that this warranted her dismissal or, subsidiarily, that her behaviour amounted to serious and gross misconduct which justified the application of the disciplinary measure of dismissal pursuant to Article 93 of the Service Regulations. The Disciplinary Committee was asked to provide a reasoned opinion and the complainant provided a written statement and supporting documents regarding the Report. In November she participated in an oral hearing held by the Disciplinary Committee.

The Disciplinary Committee issued a reasoned opinion on 17 November 2014. It unanimously recommended that, pursuant to Article 52(1), the complainant be downgraded to grade B5, step 13, and that she be assigned to a post as a paratechnical or a paralegal staff within the B5/B1 grade group. In accordance with Article 102(3) of the Service Regulations, on 12 December 2014 the complainant and her lawyer met with the Principal Director of Human Resources to discuss the recommendation of the Disciplinary Committee. On 18 December the complainant submitted written comments in response to the reasoned opinion.

In a letter of 7 January 2015 the President of the Office notified the complainant that he had decided to reassign her to another post in Directorate General 1, in job group 5, grade G7, step 1. She was further informed that she would receive concrete information on her new assignment from Human Resources in due time. On 16 February the complainant submitted a request for management review. She asked that the decision of 7 January be set aside and she sought reinstatement as an examiner. As an auxiliary request she sought re-grading to grade G9. By a letter of 24 February she was informed by the Administration that she would be reassigned as a "Business analysis expert" with effect from 1 March 2015 and that she would initially serve a probationary period of one year.

On 2 April the complainant submitted another request for management review in which she requested that the decision of 7 January 2015 (which she stated had been amended by the letter of 24 February 2015) be set aside, that she be reinstated as an examiner at grade G11 or higher, and that she not be placed on probation. As an auxiliary request she sought re-grading to grade G9 and asked that she not be considered a "new recruit".

On 13 April 2015 the complainant attended a management review meeting with members of the Administration. Following that meeting, on 24 April she provided additional written comments and requested that they be treated as an appendix to her earlier request for management review of 2 April. On 29 April the complainant attended another meeting with members of the Administration regarding the matter.

By a letter of 15 May 2015 the President informed the complainant that her requests for review were rejected as unfounded. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision. She seeks compensation in an amount equivalent to the salary and benefits she would have been paid had she not been downgraded from 1 March 2015, with interest at the rate of 8 per cent. She seeks immediate reinstatement to her former grade and job group. She claims 500,000 euros in material and moral damages, and 25,000 euros in costs.

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant commenced employment with the EPO as an examiner in 2002 at grade A2. Beginning in early 2006 she experienced trauma in her personal life that affected her mental health. She was promoted to grade A3 in September 2006. For the years 2002 to 2007, the complainant received staff reports with an overall rating "good". Thereafter her overall ratings declined and by January 2013 her overall rating was "unsatisfactory". Her continued perceived unsatisfactory performance led to a report in October 2014 under Article 52(2) and Article 100(1) of the Service Regulations. The report was authored by the Principal Director of Human Resources and identified dismissal under Article 52 as the proportionate measure for the "proven and admitted continuous underperformance without any reasonable prospect of improvement". It also identified, "on a subsidiary basis", dismissal under Article 93(2)(f) as a disciplinary measure for the "serious and gross misconduct violating the standards of conduct and performance required by a staff member of the Office under Articles 5(1) and 24(1) [of the Service Regulations] and the primary duty of the permanent staff member to perform her job. The [complainant's] behaviour is also in breach of Article 14(1) [of the Service Regulations], which requires an employee to carry out his duties and conduct himself solely with the interests of the Office in mind."

2. This report led to consideration of the complainant's conduct by a Disciplinary Committee which reported to the President in November 2014. The Disciplinary Committee concluded that the complainant "proved and remains professionally incompetent in the performance of her duties as an examiner" and recommended, as a "disciplinary measure", the "[d]owngrading [of the complainant] to [g]rade B5, step 13, within the B5/1 grade group and assign[ment] to a post as paratechnical/paralegal staff". However the Disciplinary Committee made no findings of misconduct and indeed said: "[t]here is no evidence of 'intentional breach of her main obligation to work' or of 'insubordination and disobedience'. The [complainant] has tried to

improve and has managed to do so in 2014, with big efforts from her side."

3. By letter dated 7 January 2015 sent to the complainant, the President addressed the conclusions and recommendation of the Disciplinary Committee. He accepted the conclusion that the complainant had proved incompetent to perform her duties though he disagreed with some of the Disciplinary Committee's subsidiary conclusions. The President decided to "re-assign [the complainant] to another post in [Directorate General] 1, in job group 5, grade G7, step 1". Like the Disciplinary Committee, the President made no findings of misconduct.

4. By a letter dated 24 February 2015 the complainant was informed by the Principal Director of Human Resources that the President's earlier decision would be given effect by reassigning her as a "Business analysis expert" to the Directorate "Business Analysis and Planning" as from 1 March 2015. She was also informed in that letter that "following your new assignment, in accordance with Article 13(2) first [indent] [of the Service Regulations] you will initially serve a probation period of 1 year. Should your performance not be found adequate for this new post, the Office shall terminate your employment pursuant to Article 13(4)(b) first [indent] [of the Service Regulations]."

5. The complainant sought a review of the decision of 7 January 2015 as implemented, but that request was rejected as unfounded by a decision of the President in a letter dated 15 May 2015. This is the decision impugned in these proceedings.

6. In their pleas the complainant and the EPO raise a multitude of issues. However at least three of the issues should be resolved in the complainant's favour which, together, lead directly to the conclusion that the impugned decision is unlawful and should be set aside. Accordingly, the Tribunal now addresses those issues. The first issue concerns the introduction into the complainant's employment of a status that had not existed immediately before the implementation of

the decision of 7 January 2015 as affirmed in the impugned decision of 15 May 2015, namely, a probationary period. The second issue concerns the conflation of a procedural rule concerning how an allegation of incompetence should be addressed with a substantial rule governing the imposition of a disciplinary measure for misconduct. The third issue concerns the procedure to be adopted in the face of a finding of incompetence for the purposes of Article 52 of the Service Regulations coupled with a decision not to dismiss but to reassign.

7. When the complainant first commenced employment at the EPO, she did so as a probationary employee for the first 12 months. The fact that this occurred is unexceptionable and the requirement to serve a probationary period immediately after engagement is a common feature of employment with international organisations. Within the EPO, probationary periods are governed by Article 13 of the Service Regulations. At the time of the decision of 7 January 2015 to reassign the complainant and its implementation in early 2015, Article 13 provided:

> "(1) Employees shall serve a probationary period upon appointment pursuant to Article 4, paragraph 1, in order to determine their ability to perform their duties as well as their efficiency and conduct in the service.
>
> (2) The period shall be:
>
> – one year in case of recruitment and promotion,
>
> – six months in case of transfer.
>
> The appointing authority may decide in exceptional cases to extend the probationary period by a further period of up to the same length.
>
> (3) Before the expiry of each period of six months within the probationary period, a report shall be made on the ability of the probationer to perform his duties as well as on his efficiency and conduct in the service. The report shall be communicated to the probationer, who shall have the right to submit his comments in writing.
>
> (4) (a) At the end of the probationary period and on the basis of the probationary report or reports, the appointing authority shall decide, in case of satisfactory fulfilment of duties, efficiency and conduct, to confirm the appointment.
>
> (b) A report on the probationer may be made at any time during the probationary period, if the fulfilment of his duties, his efficiency and his conduct are proving inadequate. On the basis of the probationary report or reports, the appointing authority may:

– dismiss a new recruit on probation,

– decide that the probationer who has been transferred or promoted shall either return to his previous post or, if this has been filled, to a post corresponding to the grade of his previous post for which he satisfies the requirements.

(5) Except where he is entitled forthwith to resume his duties with the national administration or the organisation in which he served prior to his recruitment to the Office, a new recruit on probation who is dismissed pursuant to paragraph 4, letter b, first indent, shall receive compensation equal to two months' basic salary if he has completed at least six months' service, and to one month's basic salary if he has completed less than six months' service.

(6) A new recruit on probation may submit his resignation at any time during the probationary period. Without prejudice to paragraph 4, letter b, resignation shall take effect as from the date proposed by the probationer provided this is earlier than the date on which the probationary period would normally have ended.

(7) In case of promotion or transfer, an employee may, at any time during the probationary period, request to return to his previous post or, if this has been filled, to a post corresponding to the grade of his previous post for which he satisfies the requirements."

8. Article 4(1) of the Service Regulations addressed the filling of vacant posts by transfer at the same grade within the Office, transfer or promotion as a result of an internal competition or recruitment, transfer or promotion as a result of a general competition open both to employees of the Office and to external candidates. It can be seen that Article 13 was cast in terms that required employment for a probationary period in each of these three situations. It is also clear that dismissal under Article 13(4)(b) was only available to the EPO in relation to "new recruits" in contradistinction to staff members who have been promoted or transferred. That is to say, it is only a staff member initially recruited to the EPO who can be dismissed "if the fulfilment of his duties, his efficiency and his conduct are proving inadequate". It is to be recalled that in the letter of 24 February 2015 the EPO asserted the right to be able to terminate the complainant's employment pursuant to Article 13(4)(b).

9. The EPO argues in its pleas that the reassignment of the complainant equated to a recruitment *sui generis* and, as such, fully justified a probationary period and, in any event, the issue of the lawfulness of the imposition of the probationary period is now moot given that, by letter dated 10 February 2016, the complainant was officially informed that her probationary period had been completed successfully.

10. However, the provisions of Article 13 were clear. A probationary period occurs in the three circumstances specified in the Article. None were the position the complainant was in at the time of, and as a result of, the decision of 7 January 2015 as implemented in early 2015 nor at the time of the impugned decision. Accordingly, the EPO was not entitled to place the complainant on probation and quite plainly was not entitled to say she could be dismissed under Article 13(4)(b). The decision to place the complainant on probation was unlawful.

11. Article 52 of the Service Regulations dealt with incompetence. It provided:

> "(1) Subject to Article 23 of the Convention, a permanent employee who proves incompetent in the performance of his duties may be dismissed.
>
> The appointing authority may, however, offer to classify the employee concerned in a lower grade and to assign him to a post corresponding to this new grade.
>
> (2) Any proposal for the dismissal of a permanent employee shall set out the reasons on which it is based and shall be communicated to the employee concerned. He shall be entitled to make any comments thereon which he considers relevant.
>
> The appointing authority shall take a reasoned decision, after following the procedure laid down in regard to disciplinary matters.
>
> (3) Subject to Article 13, a permanent employee shall not be dismissed without notice. The notice shall be calculated on the basis of one month for each year of actual service; it shall not, however, be less than three months, nor greater than nine. The period of notice shall commence on the first day of the month following the date of notification of the decision to dismiss the employee. The period of notice shall be increased by one month for a permanent employee

> having his home as defined in Article 60, paragraph 2, in a country other than that in which he is employed."

This Article required that the EPO follow "the procedure laid down in regard to disciplinary matters". Those procedures were found in Title VII (Articles 93 to 105) of the Service Regulations. However Article 52(2) does no more than incorporate a procedure to be followed in circumstances where a member of staff is thought to be incompetent subject, almost certainly, to the modification of that procedure if necessary to adapt it to a determination of incompetence. That is, to apply it *mutatis mutandis*. The provision does not transmogrify incompetence into conduct in respect of which disciplinary action might be taken and a disciplinary measure imposed (see Judgment 918, consideration 11). Once that procedure has been followed and a determination of incompetence made, the available remedies are those identified in Article 52. That is to say, the staff member can be dismissed or the EPO can "offer to classify the employee concerned in a lower grade and to assign him to a post corresponding to this new grade". The focus of this latter remedy is classification at a lower grade.

12. The President, in the impugned decision, appears not to have fully appreciated the clear line between an Article 52 remedy for established incompetence and a disciplinary measure for proven misconduct. Indeed, his letter of 15 May 2015 is replete with inappropriate language that should only be used in relation to allegations of misconduct. In response to an argument of the complainant that the decision of 7 January 2015 did not satisfy the legal requirements of proportionality, the President said: "I would like to note that according to the ILOAT case law, a disciplinary measure may be set aside if it is *manifestly* disproportionate to the misconduct. In the present case, you have submitted no arguments whatsoever to substantiate your claim."

13. In its reasoned opinion, the Disciplinary Committee addressed the remedy following a finding of incompetence under the heading "[a]ppropriate disciplinary sanction". This heading was inapt as it was not addressing a disciplinary sanction. Nonetheless the Committee,

under this heading, addressed the correct question, namely what might be the appropriate remedy under Article 52. The Committee observed:

> "Art 52 [of the Service Regulations] is silent on whether the lower grade is within a particular grade band. As a result, the committee believes that the spirit and intention of this sanction is to be able to downgrade the [complainant] sufficiently to a level at which (s)he is considered capable of being professionally competent. The fact that the article also specifically mentions re-assignment to a new post further support this view. Such an interpretation is not only logical but also errs in favour of the [complainant], for whom otherwise dismissal would be the only sanction."

The Disciplinary Committee's approach was, in this regard, correct, save that it wrongly referred to a "sanction". Reference to a sanction is entirely inapt when considering the question of incompetence and what should be done in the event that the permanent employee is found to be incompetent. However the President approached the matter differently.

14. In the President's decision in the letter of 7 January 2015 he rejected the approach of the Disciplinary Committee and its recommendation based on the approach. Of some significance is that on 1 January 2015 a new classification and grading system was introduced by the EPO. Thus it was not possible for the President to give effect, literally, to the recommendation of the Disciplinary Committee even if he was minded to do so. But nonetheless the legal question was not whether the reclassification of the complainant under Article 52(1) was a proportionate or disproportionate disciplinary measure. The legal question was whether an appropriate lower grade could be identified into which the complainant would be classified and ultimately the assignment of the complainant to a post corresponding to this new grade. That process plainly involved the identification of an appropriate post. Obviously the identification of the grade, the reclassification and the identification of a post and assignment to it would depend on a number of factors. They would include the skills and qualifications of the complainant notwithstanding that they did not then render the complainant competent to perform the work of an examiner at grade A3. Also relevant would be an assessment of the level of competency of the complainant which would inform the decision about the grade in which the complainant should be classified. The level of the competency

would influence or even determine the extent to which the complainant was reduced in grade. Similar considerations would bear upon the identification of a post in the new grade to which the complainant could be assigned. The President did not undertake an exercise with this legal framework in focus even if, as a practical matter, some or perhaps even all these considerations were in play. This is a legal flaw in the impugned decision.

15. A third and related issue arising from the language of Article 52(1) is that once this assessment is undertaken by or on behalf of the President, an offer should have been made to the complainant identifying the new lower grade and the post to which she might be assigned. It was not. Reasonably clearly this step of making an offer is intended to ensure that a permanent employee proven to be incompetent in the position she or he then held, has the opportunity of discussing with the EPO what work she or he might do within the EPO into the future. In the ordinary course, one would expect that a decision to offer to classify the permanent employee in a lower grade and assign her or him to a new post would be significantly more attractive to the staff member concerned, found to be incompetent, than a decision to dismiss. Nonetheless important considerations may arise for the affected staff member including alterations to remuneration and likely career paths within the EPO. Indeed it is not possible to entirely discount, once an offer was made, negotiations or at least discussions taking place between the affected staff member and the EPO about what the EPO proposed. In a case such as the present where mental health issues were involved, some form of agreed medical assessment might also be appropriate to gauge competency given that the underlying aim of this process is to place the affected permanent employee in a position where she or he is competent and contributing to the overall work of the EPO.

16. In identifying these flaws in the decision making of the President, the Tribunal is not seeking to suggest that the President and those advising him were not acting with the interests of the complainant in mind having regard to her personal circumstances. But there were, as discussed, flaws in the process and the impugned decision should be set

aside. The matter will be remitted to the EPO to undertake the evaluation provided for in Article 52, as explained in considerations 14 and 15, above.

The complainant is entitled to moral damages which the Tribunal assesses in the sum of 30,000 euros. The Tribunal is not satisfied that material damages should be awarded. A basis for awarding them has not been established by the complainant. It is quite possible that a decision properly made would have had the same result, at least financially, for the complainant. It would simply be speculation to conclude that the result, financially, would have been different. The complainant is entitled to costs assessed in the sum of 8,000 euros.

DECISION

For the above reasons,

1. The impugned decision of 15 May 2015 is set aside.
2. The matter is remitted to the EPO to undertake the evaluation provided for in Article 52 of the Service Regulations, as explained in considerations 14 and 15, above.
3. The EPO shall pay the complainant 30,000 euros as moral damages.
4. The EPO shall pay the complainant 8,000 euros as costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 9 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