**S. (No. 3)**

***v.***

**EPO**

**126th Session** **Judgment No. 4052**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr M. S. against the European Patent Organisation (EPO) on 6 September 2016 and corrected on 18 January 2017, the EPO's reply of 26 April, the complainant's rejoinder of 18 August, corrected on 25 August, and the EPO's surrejoinder of 28 November 2017;

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 contests the decision to subject him to disciplinary proceedings after his separation from the EPO and to impose upon him the disciplinary measure of a reduction by one third in the amount of his retirement pension.

The complainant joined the European Patent Office – the EPO's secretariat – in July 1990. He was dismissed for serious misconduct effective 1 June 2009. On 15 May 2015, approximately half a year after he had taken up employment with the Staff Union of the European Patent Office (SUEPO), the EPO Investigative Unit informed him that it had initiated an investigation into allegations of misconduct against him. The alleged misconduct consisted in the unauthorised publication on the Internet, at least throughout 2014 and under the use of various

pseudonyms, of information and opinions about the work of the EPO, including non-public information and defamatory and insulting opinions. The complainant was invited to attend an interview with the Investigative Unit but he declined. His counsel subsequently submitted written comments on the Investigative Unit's summary of findings. In its report of 31 August 2015, the Investigative Unit concluded that the allegations were well founded and recommended the initiation of disciplinary proceedings.

By a letter of 15 December 2015, the EPO initiated disciplinary proceedings against the complainant and requested the Disciplinary Committee to submit a reasoned opinion and a recommendation on the appropriate disciplinary measure.

Attached to this letter was the Administration's report under Article 100 of the Service Regulations for permanent employees of the European Patent Office summarising the charges against the complainant. According to that report, acting under various pseudonyms and using his blog, other Internet sites and Twitter the complainant had: (a) published or caused the publication of information and opinions dealing with the work of the EPO without permission from the President of the Office (Article 20(2) of the Service Regulations); (b) disclosed in an unauthorised manner non-public information about and belonging to the EPO (Article 20(1) of the Service Regulations); (c) published opinions of insulting, defamatory and/or libellous content against various EPO staff members and management, but also against the management of other international and public organisations (Article 20(2) of the Service Regulations and Circular No. 341 concerning the Policy on the prevention of harassment and the resolution of conflicts at the EPO); and (d) accepted appointment contrary to the duty to behave with integrity and discretion (Article 19 of the Service Regulations). The Administration's report concluded that the complainant's actions justified the disciplinary measure of a reduction in the amount of his retirement pension by one third pursuant to Article 93(2)(f) of the Service Regulations.

The complainant submitted his response on 28 December 2015 and the EPO submitted a "reply to the defendant's response" on 8 January 2016. The hearing of the Disciplinary Committee was held as initially scheduled on 12 January 2016, without the complainant.

In its opinion of 18 January 2016, the Disciplinary Committee found that the complainant's misconduct had been established with regard to the first charge insofar as it concerned material published on his blog, but not insofar as it concerned opinions published on Twitter, as he was not considered to be the author of these opinions. As regards the second charge, a majority of the Committee's members found that his misconduct had been proven, whereas a minority considered that it had not. With regard to the third and fourth charges the Committee found that the complainant's misconduct had not been established. Noting that the measure of a reduction in pension provided for in Article 93(2)(f) of the Service Regulations could only be imposed together with the measure of dismissal, the Disciplinary Committee concluded that the measure could not be applied to a former employee, and it thus unanimously recommended that the complainant be issued a reprimand.

In a letter of 18 February 2016, the President of the Office informed the complainant that he considered his behaviour as "serious and gross misconduct" violating the standards of integrity and discretion expected from staff members under Articles 19 and 20 of the Service Regulations and that he had, therefore, decided to impose upon him the maximum sanction foreseen in Article 93(2)(f) of the Service Regulations, namely a reduction by one third in the amount of his retirement pension. The President also informed the complainant that he would continue to remain "at all times excluded from entering the EPO premises".

On 15 April 2016 the complainant requested a review of the 18 February 2016 decision but, by a letter of 13 June 2016, which constitutes the impugned decision, the President rejected his request for review, maintaining his earlier decision.

The complainant asks the Tribunal to set aside the impugned decision and to order that no reduction in the amount of his retirement pension can be made now or in the future. He also asks the Tribunal to declare that neither the Administration nor the Disciplinary Committee

had jurisdiction over him as a former staff member and to order the EPO to dismiss all charges against him as unsubstantiated. He claims 50,000 euros in moral and exemplary damages, 150,000 euros in punitive damages, and such other relief as the Tribunal deems just, necessary and equitable. He also claims the actual costs incurred by him during the disciplinary proceedings and the proceedings before the Tribunal.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable and unfounded in its entirety.

## CONSIDERATIONS

1. Following the 18 January 2016 opinion of the Disciplinary Committee, the President of the Office informed the complainant, by a letter of 18 February 2016, of his decision to deviate from the Committee's recommendation and to instead impose on him the maximum disciplinary sanction foreseen in Article 93(2)(f) of the Service Regulations, that is, a reduction in pension by one third.

Article 93(2)(f) provides:

> "(2) Disciplinary measures shall take one of the following forms:
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> [...]
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> (f) dismissal and, where appropriate, reduction in the amount of the severance grant under Article 11 of the Pension Scheme Regulations or of the retirement pension and, where applicable, of the portion of remuneration owed as a result of participation in the salary savings plan. Any such reduction shall not be more than one third of the sum in question and, as applied to the pension, shall not make its amount less than the minimum laid down in Article 10, paragraph 3, of the Pension Scheme Regulations."

2. The President noted, in the 18 February 2016 letter, that "[s]hould [the complainant's] entitlement to pension be higher than the minimum laid down in Art. 10(3) [of the Pension Scheme Regulations], the sanction shall apply". The President endorsed the Disciplinary Committee's conclusions on the first charge, insofar as it concerned the complainant's blog, but found that the evidence rendered it "overwhelmingly probable" that the complainant was the owner of the

Twitter account in question and therefore maintained the entire first charge as proven. With regard to the second charge, the President fully shared the opinion of the majority of the Committee's members that his misconduct had been proven. Considering the third charge, the President wrote "[t]he Office, contrary to the Disciplinary Committee's opinion, wishes to emphasise that the fundamental principles of the Office's Policy on the prevention of harassment are applicable and binding at all times regardless of whether the specific formal procedure foreseen therein has been initiated or not". The President found that the content of the complainant's blog "was widely 'offensive' and in any case 'unwelcome' for certain protected persons in the sense of Art. 2 of Circular No. 341". Concerning the fourth charge, contrary to the Disciplinary Committee's opinion, the President maintained the Office's position that "in view of [the complainant's] previous disciplinary procedure after which [the complainant was] dismissed from service for massive lack of integrity and for damaging the Office's interests, any appointment which kept [him] in such close proximity of the Office's business and allowed [him] a daily interaction with staff members and staff representatives would not be in compliance with [his] continuous duty 'to behave with integrity and discretion'". The President noted that the Disciplinary Committee had recommended "the highest possible sanction" but he disagreed with its interpretation of Article 93(2)(f), according to which a reduction of pension could only be imposed with dismissal. The Disciplinary Committee had unanimously recommended the disciplinary measure of a reprimand under Article 93(2)(b) of the Service Regulations.

3. On 16 March 2016 the Administrative Council adopted Resolution CA/26/16 as a response to the social unrest at the EPO. In that resolution, the Administrative Council requested the President, among other things, "to ensure that disciplinary sanctions and proceedings are not only fair but also seen to be so, and to consider the possibility of involvement of an external reviewer or of arbitration or mediation pending the outcome of this process and before further decisions in disciplinary cases are taken, to inform the [Administrative

Council] in appropriate detail and make proposals that enhance confidence in fair and reasonable proceedings and sanctions".

4. On 15 April 2016 the complainant filed his request for review of the President's 18 February 2016 decision to impose on him the maximum sanction provided for in Article 93(2)(f) of the Service Regulations. He asked to be exonerated or "at the very least that the recommendations of the Disciplinary Committee be endorsed in full".

5. The President informed the complainant, by a letter dated 13 June 2016, of his decision to reject his request for review "as partly irreceivable". He stated that, as the imposed sanction of a reduction in pension would only apply if the complainant's pension entitlement became higher than the minimum laid down in Article 10(3) of the Pension Scheme Regulations, the complainant could not claim that the sanction was prejudicial to him as long as this condition did not materialise. The President also found that the request for review was "unfounded in all aspects", noting in particular that: the actions of which he was accused were specific and sufficiently proven, the provisions of Articles 19 and 20 of the Service Regulations were applicable to him as a former employee and the Office had jurisdiction to take disciplinary steps; the procedure had taken place in strict accordance with the applicable provisions and he had been given sufficient opportunities to defend himself in full respect of his right to be heard and his right to due process; the President had decided only after receiving a full file on the matter and "after assessing carefully the totality of relevant aspects"; the complainant's freedom of expression could neither be "exonerating" nor "mitigating" for him; and the sanction imposed was the only one "with a clear and reasonable effect". In that regard, the President noted, more specifically, that "[w]hen assessing the different options under Art. 93 [of the Service Regulations], however, [the Disciplinary Committee] concluded that a reduction of pension entitlements is not possible [...]. The Office did not share this opinion and sufficiently reasoned its position pointing out that it is the only logical interpretation of the provision that a reduction of pension entitlements is the disciplinary sanction specifically designed

to address the serious misconduct of former staff and the only one with a clear pecuniary as well as preventive effect for the latter. Any other reading of this provision would mean that any former employees could safely breach their obligations towards the Office without fear of sanction." This is the impugned decision.

6. The complainant's grounds for complaint are the following:

(a) the impugned decision is unlawful per se, as the acts in question leading to the charges against him did not constitute misconduct; in that connection he reiterates his prior denial of any such misconduct on his part;

(b) the disciplinary proceedings were tainted with procedural irregularities and violated his right to a fair trial;

(c) the disciplinary measure imposed on him resulted from the application of an improper standard of proof;

(d) the imposed disciplinary measure was wholly disproportionate to the charges laid against him (even if the acts with which he was charged were deemed to be misconduct) and it was imposed after the Disciplinary Committee recommended the measure of a reprimand, and without considering alternative sanctions or mitigating factors;

(e) the impugned decision was taken as a retaliatory measure directed against him, as a SUEPO member, thereby violating his fundamental right to freedom of association; and

(f) it was taken in violation of Administrative Council Resolution CA/26/16.

7. The complainant has marked both the "yes" and the "no" boxes on the complaint form under section 5 "Special Applications" for requests for oral hearings. He has not justified his request for hearings in his submissions. He also requests documents from the EPO regarding all evidence gathered by the Investigative Unit, all documentation on the duration of the investigation and the Investigative Unit's surveillance of his blog and accessing of his Internet accounts and the means through which this was done, the recording of and the minutes of the

Disciplinary Committee's hearing on 12 January 2016, the audio recording of the testimony of the expert witness heard by the Disciplinary Committee, documentation on the Investigative Unit's evidence collection methodology, and the complaint under Circular No. 341 pursuant to which the investigation against him commenced.

8. As the request for oral hearings is unclear and lacks any justification, it is rejected.

9. The EPO contests the receivability of the complaint insofar as it concerns the possible future application of the sanction, as detailed in the 18 February and 13 June 2016 decisions, and the challenge to the house ban imposed on the complainant. The EPO argues that, as the complainant currently suffers no injury from the potential application of the sanction, he does not have a cause of action to bring a claim in that respect. With regard to the house ban, the EPO emphasises that the complainant's claim in this respect is not receivable as the decision in question does not violate the complainant's terms of service or any internal rule, and in any case, has not been appealed; and this claim would therefore also be irreceivable for failure to exhaust all internal means of redress.

10. The Tribunal finds that inasmuch as the impugned decision is a decision that is adverse to the complainant, he has a cause of action in the present case. With regard to the claim concerning the house ban, the Tribunal considers that it is irreceivable. In the 18 February 2016 decision, the President wrote: "[i]n view of the specific nature of your misconduct, you continue to remain at all times excluded from entering the EPO premises". Considering the use of the phrase "you continue to remain", the Tribunal finds that the 18 February 2016 letter merely confirms the continuance of a previous decision, which the President made at some earlier point in time, to impose a house ban on the complainant, and cannot be considered a new decision. In any case, the EPO was correct in noting that, if it were to be considered as a new decision notified to the complainant in the letter dated 18 February

2016, he would have had to follow the normal procedures for challenging it (that is, request for review and internal appeal).

11. The claim based on Administrative Council Resolution CA/26/16 is a threshold issue. Resolution CA/26/16, cited in consideration 3 above, aimed at ending "the social unrest within the [European Patent] Office". In that Resolution, it is noted that disciplinary sanctions and proceedings against staff or trade union representatives are being widely questioned in the public opinion and have made it more difficult to reach a consensus to establish a framework for negotiations between social partners. Resolution CA/26/16 requested the President of the Office "to ensure that disciplinary sanctions and proceedings are not only fair but also seen to be so, and to consider the possibility of involvement of an external reviewer or of arbitration or mediation".

12. The complainant contends that the impugned decision was taken as a retaliatory measure against him, as he was a SUEPO member, and the President did not apply Resolution CA/26/16. The EPO in its reply raises the objection that "the Council's instruction is limited to 'decisions in disciplinary cases'; it does not apply to the internal appeal mechanisms. As the impugned decision was a decision on the complainant's request for review, the instructions in CA/26/16 did not apply to the impugned decision". The objection is unconvincing: the instruction referred to in Administrative Council Resolution CA/26/16 applies to the impugned decision that was the final decision in the disciplinary proceedings against the complainant. In its surrejoinder, the EPO deduces, contrary to the above, that "[t]he resolution neither had the purpose nor the effect of suspending the application of the internal rules concerning disciplinary proceedings, and could not have in any way prevented the President from taking decisions. On the contrary, the President had a clear duty under Article 10 [of the European Patent Convention] to continue to manage the Office and ensure the rule of law. He complied with this duty when he issued his decision on the complainant's request for review. The fact that the [Disciplinary Committee] found the complainant's behavior to constitute

serious misconduct supports the conclusion that the Office simply could not have acted differently in this case."

13. The Tribunal observes that the President had the power to suspend the disciplinary proceedings and to propose the involvement of an external reviewer or of arbitration or mediation as per the instruction in Administrative Council Resolution CA/26/16. The Tribunal does not find persuasive the justifications put forward by the EPO in its submissions regarding the President's decision not to take into account the instruction in Resolution CA/26/16. In fact, there are two apparent omissions: first, the President did not actually appear to have considered the Administrative Council's instruction, and, secondly, he did not give any reasons for not having considered the possibility of involvement of an external reviewer or of arbitration or mediation.

14. The complainant's plea that in the decision impugned before the Tribunal the President did not consider the instruction referred to in Administrative Council Resolution CA/26/16 is well-founded. The latter Resolution contained an instruction to the President of the Office requiring him to consider "the possibility of involvement of an external reviewer or of arbitration or mediation". The fact that the President, contrary to the Administrative Council's instruction, did not consider that possibility before adopting the impugned decision, which was the final decision on the disciplinary proceedings against the complainant, constitutes a material flaw that renders the impugned decision unlawful.

15. In light of the above considerations, the impugned decision of 13 June 2016, must be set aside, as must the earlier decision of 18 February 2016, and the case must be sent back to the President of the Office for a new examination, which shall take into account the instruction to the President contained in Administrative Council Resolution CA/26/16. Accordingly, it is unnecessary to consider the complainant's request for the production of documents. In the specific circumstances of this case, no award of moral damages or costs will be made.

DECISION

For the above reasons,

1. The impugned decision of 13 June 2016 is set aside, as is the earlier decision of 18 February 2016.

2. The case is sent back to the EPO for the President of the Office to undertake a new examination, which shall take into account the instruction to the President contained in Administrative Council Resolution CA/26/16 dated 16 March 2016.

3. The claim against the house ban decision is dismissed.

In witness of this judgment, adopted on 8 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ