G.

v.

EPO

131st Session **Judgment No. 4364**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. G. against the European Patent Organisation (EPO) on 14 February 2018 and corrected on 6 March, the EPO's reply of 13 June, corrected on 20 June, the complainant's rejoinder of 18 October 2018 and the EPO's surrejoinder of 21 January 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 on him the disciplinary measure of dismissal for misconduct.

The complainant served as a staff member of the European Patent Office, the EPO's secretariat, at its branch in The Hague from June 2000 until June 2017, at which point his appointment was terminated on disciplinary grounds.

In 2003 the complainant and Ms L.G., his wife at the time, separated and the complainant was ordered by a French court to pay Ms L.G. 500 euros per month in child support for their daughter (born in 2001). In January 2004 the complainant started receiving from the EPO Long-Term Care benefits for Ms L.G. On 27 September 2004 the complainant and Ms L.G. divorced. The complainant married Ms V. on 28 October 2005 and had two children with her, a daughter (born in 2006) and a son

(born in 2008). On 8 March 2011 the complainant and Ms V. divorced and assumed, from then onwards, shared custody of their two children. The complainant had notified the Office of his first marriage and the birth of all three of his children but made no reference to having divorced Ms L.G. or having married and later divorced Ms V.

On 27 June 2015 Ms L.G. reported to the Principal Director of Human Resources that, since 1 January 2015, the complainant had ceased to make the monthly child support payments ordered by the French court, and she sought assistance in finding a solution. As the information available to the Office on the complainant's marital status as at June 2015 showed the complainant to be still married to Ms L.G., the complainant was asked to provide clarification, which he did on 8 September 2015 by confirming that he and Ms L.G. had been divorced since September 2004.

The Principal Director of Human Resources reported allegations of possible misconduct by the complainant to the Investigative Unit on 8 February 2016, citing Article 65(1)(f) of the Service Regulations for permanent employees of the European Patent Office, which requires that "[a]ll permanent employees in receipt of an allowance shall inform the President of the Office immediately in writing of any change which may affect their entitlement to that allowance". Following a preliminary assessment on 16 February, the Investigative Unit carried out an investigation from 21 June to 22 September 2016. The complainant was informed of this on 9 September 2016. On 12 September he was interviewed by the Investigative Unit and on 14 October 2016 he was provided with a summary of the Investigative Unit's preliminary findings to which he responded on 4 November 2016.

In its final report dated 25 November 2016, the Investigative Unit found that: (i) the complainant had intentionally misrepresented facts relevant to his family situation in order to obtain a personal advantage, namely the receipt of undue Long-Term Care benefits in respect of Ms L.G., thereby causing financial damage to the Office in the amount of 262,689.42 euros; (ii) he had violated the obligation of all permanent employees in receipt of an allowance to inform the President immediately of any change which may affect their entitlement to that allowance under Article 65(1)(f) of the Service Regulations; (iii) he had intentionally misrepresented facts relevant to his family situation in order to obtain a personal advantage, namely the receipt of spouse-related home leave travel expenses for the years from 2012 to 2014, thereby causing financial

damage to the Office in the amount of 2,455.51 euros – although it was noted that the complainant had paid back this amount. The Investigative Unit recommended that the Office consider initiating disciplinary proceedings.

On 26 January 2017 the complainant was suspended from service with half of his basic salary withheld for the period of suspension and he was banned from EPO premises. On 27 April 2017 the EPO initiated disciplinary proceedings against him by submitting to the Disciplinary Committee a report under Article 100 of the Service Regulations and inviting the Committee to deliver a reasoned opinion. The complainant was relevantly informed on 28 April 2017. On 3 May 2017 an addendum was issued to the report under Article 100. In that addendum the complainant was charged with a further instance of misconduct for having declared to the EPO that he had not received a childcare allowance for his son from any other source in 2010 and 2011, notwithstanding that a special childcare subsidy for the same child had been paid by the Dutch authorities to Ms V. for both years. Having held a hearing on 22 May 2017, the Disciplinary Committee delivered a reasoned opinion on 26 May 2017, in which it found that the complainant had acted intentionally (by concealing facts, submitting false declarations and failing to provide correct information) in order to benefit from the Long-Term Care and home leave allowance payments. With regard to the allegations relating to the childcare allowance, the Committee found that the complainant had acted negligently in failing to verify whether similar allowances had been paid from other sources. The Disciplinary Committee unanimously recommended the disciplinary measure of dismissal pursuant to Article 93(2)(f) of the Service Regulations.

By a letter of 26 June 2017, the President of the Office informed the complainant of his decision to endorse the opinion of the Disciplinary Committee and to impose upon him the disciplinary measure of dismissal for serious misconduct with immediate effect and to ban him at all times from EPO premises. The President also informed the complainant that he would be entitled to compensation corresponding to the statutory period of notice, but that such compensation would be set off against the undue payments received by him. On 25 September 2017 the complainant sought a review of this decision but, by a letter of 16 November 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 remove from his personal 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 reimbursement of all legal costs incurred by him during the disciplinary proceedings, the management review process and the present complaint before the Tribunal. He seeks reparation and moral damages for the loss of the possibility for career progression since his suspension. He claims interest on all amounts awarded by the Tribunal and such other relief as the Tribunal may find to be just, fair and appropriate.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part for want of a cause of action and unfounded in the remainder.

CONSIDERATIONS

1. The complainant impugns the EPO President's 16 November 2017 decision to reject his request for review of the President's 26 June 2017 decision to accept and endorse the Disciplinary Committee's 26 May 2017 unanimous recommendation to dismiss the complainant for misconduct under Article 93(2)(f) of the Service Regulations.

2. The complainant impugns the decision on the following grounds:

(a) Procedural errors:

- the disciplinary proceedings were started for improper and abusive motives;
- the investigation breached the complainant's right to due process, as it was not conducted in French;
- the interview violated the complainant's right to legal advice and assistance;
- the report under Article 100 of the Service Regulations failed to provide the complainant with sufficient notice of the charges against him, in particular the charge included in the addendum, thereby preventing him from adequately preparing a defence;

- the Disciplinary Committee was not properly constituted; and
- the Disciplinary Committee's opinion was not sufficiently reasoned;

(b) Errors of fact and of law:

- the impugned decision erroneously upheld the finding that the complainant was under no legal obligation to pay maintenance to Ms L.G.;
- the impugned decision erroneously endorsed the conclusion that the "repeated and persistent submission of incorrect declarations and the omission to provide correct information, despite frequent reminders from the Office [...] were done intentionally"; and
- the impugned decision and Disciplinary Committee's opinion failed to specify the correct burden of proof in relation to essential elements of the alleged misconduct;

(c) The sanction of dismissal lacked proportionality;

(d) The President erroneously relied on three aggravating factors and did not properly consider the mitigating factors.

3. The complainant claims that the disciplinary proceedings were started for improper and abusive motives. This claim is unfounded. The complainant has not provided any convincing evidence to support his allegation. He submits that the disciplinary procedure was initiated in retaliation against him because he had contacted the President on 6 October 2016, and his Principal Director on 18 January 2017, suggesting ways to better utilise the suggestion box in order to improve dialogue between management and staff. He implies that the timing of the issuance of the Investigative Unit's report, shortly after he had contacted the President, and of his suspension, shortly after he had contacted his Principal Director, share a causal link. He argues that the President's sensitivity to criticism made the complainant's suggestion appear a threat. These allegations do not prove that the disciplinary proceedings were initiated in retaliation against the complainant as the temporal sequence cannot be considered as proof that the second fact is causally related to the first. Moreover, the investigation was initiated on 8 February 2016 when the Principal Director of Human Resources submitted a report of possible misconduct to the Investigative Unit, some eight months prior to the complainant's unrelated suggestion to the President. It must also be noted that there is nothing in the wording

or tone of his letter to the President and email to his Principal Director that appears in any way inappropriate or threatening.

4. The complainant claims that his due process rights were violated, as the proceedings were conducted in English instead of "a language he fully understands". Article 17(4) of Circular No. 342, entitled "Guidelines for investigations at the EPO", provides that "[i]nterviews shall be conducted in one of the official languages of the European Patent Organisation, where possible in the preferred official language of the interviewee. Interviewees may reply in their preferred official language".

The complainant does not dispute that he was given the opportunity to choose any of the three official languages in which to conduct the interview and subsequent proceedings. He asserts that during the interview "at certain points, [his] answers [were] not fully expressed or [...] he d[id] not fully comprehend the questions posed to him". He thus sought to correct the transcript as he "[might] have provided information which could be incomplete and misleading" and therefore asked that "the whole statement on this subject [support for his ex-wife] be withdrawn from the minutes of the meeting". As it was a verbatim transcript, the deletion was not allowed but he was offered the opportunity to clarify his statements and was informed that his "comments to the transcript of the interview w[ould] be taken in due consideration and they w[ould] be attached to the final report for the Appointing Authority". In these circumstances, there was no violation of his due process rights.

5. The claim that his right to legal advice and assistance during the investigation interview was violated, is unfounded. According to the provisions of Circular No. 342, Articles 4(2) and 17(6), the complainant was entitled to "seek advice and support from staff representatives or legal counsel" and "be accompanied during interviews by an Office employee of [his] choice". The Tribunal notes that the complainant was accompanied by an Office employee and had the opportunity to seek advice and support from a legal counsel.

6. The complainant claims that the report under Article 100 of the Service Regulations failed to provide him with sufficient notice of the charges against him, in particular the charge included in the addendum, thereby preventing him from adequately preparing a defence. This claim is unfounded. The charge contained in the addendum described exactly

the material fact, namely, that the complainant had received the childcare allowance notwithstanding the fact that Ms V. had received the childcare subsidy from the Dutch authorities. This notice allowed a full exercise of his right to defence, as the basic facts were clearly presented in the charge. The circumstance that the Disciplinary Committee found (more favourably towards him) that he had acted negligently, instead of intentionally, does not imply any violation of his right to be informed.

7. The complainant claims that the Disciplinary Committee was not properly constituted and the Disciplinary Committee's opinion was not sufficiently reasoned. These claims are unfounded. The complainant asserts that the Disciplinary Committee was not properly constituted, as the President had not consulted the General Advisory Committee (GAC) prior to appointing the alternate Chairman, as required by the provisions of Article 98(1) of the Service Regulations. Articles 2(4) and 38(2) of the Service Regulations introduced in April 2014 implicitly abrogated the provision of Article 98(1) insofar as it required consultation of the GAC. Article 2(4) provides that the Chairman and deputy Chairman of the Disciplinary Committee shall be appointed by the President, without referring to any statutory consultation. Article 38(2) provides that the competencies of the General Consultative Committee (GCC), which replaced the GAC, be restricted to amendments of the Service Regulations, Pension Regulations and their Implementing Rules, and proposals concerning the conditions of employment of the whole or part of the staff. Therefore, the requirement to consult the GAC was not transferred to the GCC, and the Disciplinary Committee was thus properly constituted. With regard to the claims that the Disciplinary Committee's opinion lacked proper justification, the Tribunal finds that the opinion included a clear description of the facts, reasoned qualifications of those facts, and justifications for the proposed sanction, including consideration of all aggravating and mitigating circumstances.

8. The complainant claims that the impugned decision erroneously upheld the finding that he was under no legal obligation to pay maintenance to Ms L.G. He asserts that, if Ms L.G. had not refused alimony, then he would, under French law, be obligated to pay her support. The fact remains that Ms L.G., in the divorce proceedings before the French court, had refused it and therefore the Court ordered that the

complainant only pay monthly child support. Therefore, no legal obligation towards Ms L.G. existed and the EPO correctly found that the complainant was no longer eligible to receive Long-Term Care payments from the date of his divorce from Ms L.G.

9. The complainant claims that the impugned decision erroneously endorsed the conclusion that the "repeated and persistent submission of incorrect declarations and the omission to provide correct information, despite frequent reminders from the Office [...] were done intentionally". He submits that he was "in denial" of the reality of his divorce until he was asked by the EPO to respond to its request for clarification following the receipt of the 27 June 2015 letter from Ms L.G. He blames this state of denial for his omission to inform the EPO of the changes in his marital status. This argument is unconvincing. In that period of alleged denial, the complainant married Ms V., had two children with her (which he diligently reported to the Office), and divorced again. The complainant has presented no evidence that his state of denial existed, much less to such a degree as to prevent him from informing the EPO of his multiple changes in marital status, while not affecting his ability to inform the EPO of his two changes in parental status. His omission to inform the EPO violated the requirements of Article 65(1)(f) (as cited above). Moreover, the complainant also deliberately misrepresented his marital status when submitting documents which included declarations of spousal income and requests for reimbursement of spousal travel expenses for periods when he was no longer married to Ms L.G.

10. The complainant claims that the impugned decision and the Disciplinary Committee's opinion failed to specify the correct burden of proof in relation to essential elements of the alleged misconduct. It has been clearly established in the Tribunal's case law that misconduct must be proven "beyond a reasonable doubt" (see, for example, Judgments 4247, consideration 12, 4227, consideration 6, and 4106, consideration 11, as well as the case law cited therein). In his decision dated 16 November 2017, the President stated in relevant part: "Finally, with regard to [the complainant's] claim that the Disciplinary Committee did not indicate the proof upon which it relied nor the standards of intent it applied, reference is made to the various pieces of evidence (e.g. Exhibits 3 and 4 of the [Investigative Unit] report) where [the complainant] expressly and in writing misrepresented [his] marital status with regard to [Long-

Term Care] benefits. There can be no reasonable doubt as to the level of [the complainant's] awareness when it comes to such fundamental facts of [his] life as [his] marriage and divorce, neither as to the aim of benefitting unduly from the Office." In its opinion, the Disciplinary Committee noted in the summary of the complainant's submissions that "the [complainant] does not contest that he has received certain allowances from EPO that he was not entitled to and apologises therefore". In its recommendation, under the heading "Findings of the Committee", the Disciplinary Committee unanimously found in relevant part that:

- "Misconduct has been established in providing false information for the purposes of [the Long-Term Care], [...] home leave and [...] child care.
- For the purposes of benefitting from [Long-Term Care] and home leave, intention has been established in repeatedly and consistently providing false declaration and/or by omitting to provide correct information. This was done knowingly despite frequent reminders from the Office to all staff of their obligations under Article 65(1)(f).
- At least negligence has been established for child care allowance. In spite of explicit references to other sources of income (especially the [special childcare subsidy from the Dutch authorities]) the [complainant] failed to check whether his wife/ex-wife was in receipt of such an allowance."

In Judgment 4227, consideration 6, the Tribunal said: "The role of the Tribunal in a case such as the present, in relation to the question of whether the alleged conduct took place, was summarised in Judgment 3862, consideration 20. According to the well-settled case law of the Tribunal, the burden of proof rests on an organisation to prove allegations of misconduct beyond a reasonable doubt before a disciplinary sanction can be imposed (see, for example, Judgment 3649, consideration 14). It is equally well settled that the 'Tribunal will not engage in a determination as to whether the burden of proof has been met, instead, the Tribunal will review the evidence to determine whether a finding of guilt beyond a reasonable doubt could properly have been made by the primary trier of fact' (see Judgment 2699, consideration 9)." Also, in Judgment 4247, consideration 12, in response to a similar argument made by the complainant in that case, the Tribunal said: "It is clear that the facts underlying the charge of misconduct are uncontroverted.

The reference by the Director General to the 'clear and convincing evidence standard' does not detract from the fact that, in substance, the standard of beyond a reasonable doubt was met. As the assertion that [the Organization] failed to prove the complainant's misconduct beyond a reasonable doubt is unfounded, it is rejected." In the present case, even though the Disciplinary Committee did not expressly use the term "beyond a reasonable doubt", the Tribunal finds that the complainant's misconduct was in fact proven to that standard.

11. The complainant claims that the sanction of dismissal lacked proportionality and the President erroneously relied on three aggravating factors without properly considering the mitigating factors. Specifically, in his decision of 16 November 2017, the President noted the view expressed in the unanimous opinion of the Disciplinary Committee that "the seriousness of the breach of [the complainant's] obligations was aggravated by:

(i) The continuous and repeated misrepresentations of [the complainant's] status during a time span of 12 years;

(ii) The fact that the sums unduly received as [Long-Term Care] payments were not even transferred to [the complainant's] ex-spouse;

(iii) The misconduct caused damage both to the Office and to the contributors to the [Long-Term Care] scheme."

The President went on to state that "[a]ny possible mitigating circumstances or other invoked arguments were also considered carefully, however, they could not outweigh the gravity of [the complainant's] misconduct nor the aggravating circumstances mentioned above. In view of the above, the case amounts to a fraud of allowances performed with an unprecedented misrepresentation of [the complainant's] whole family life for a period of 12 years. This misconduct cannot possibly be pardoned by an international organisation requiring utmost integrity. The [Tribunal's] case law referred to during the disciplinary proceedings considers dismissal as fully justified in case even of an attempt of fraud." The mitigating circumstances which the Disciplinary Committee had considered were "the full cooperation of the [complainant] once the investigative process started, his sincere contrition and his offers to reimburse [the Office]", as well as his "childhood traumatic experience", though this experience was "not [...] seen as possibly exonerating the [complainant] fully or partially from the consequences of his misconduct".

Having regard to these various considerations, the Tribunal finds that the President did not adopt a disproportionate disciplinary measure when he decided on the complainant's dismissal for serious misconduct (see Judgment 3640, consideration 31).

12. It may be concluded from the above that the complaint must be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 22 October 2020, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 December 2020 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ