

T.
v.
EPO

125th Session

Judgment No. 3972

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. M. T. against the European Patent Organisation (EPO) on 22 February 2016 and corrected on 13 April, the EPO's reply of 2 September 2016, the complainant's rejoinder of 4 January 2017 and the EPO's surrejoinder of 9 May 2017;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for oral proceedings;

Considering that the facts of the case may be summed up as follows:

The complainant impugns the decision to impose upon him the disciplinary measure of dismissal for misconduct.

The complainant joined the EPO at its branch in The Hague in July 2003. On 12 June 2014 he was issued a warning letter for failing to attend a mandatory medical examination on three occasions. A few months later, on 29 September 2014, he was issued a reprimand for being absent from work without permission at least four times in July 2014. Then, on 28 April 2015, he was suspended from duty with half pay for failing to respond to any of the Administration's requests.

By a letter of 4 May 2015 he was informed that disciplinary proceedings had been initiated against him and that the Disciplinary Committee had been asked to issue a reasoned opinion and a

recommendation on the appropriate disciplinary measure to be imposed on him, in the light of the facts set forth in a report drawn up under Article 100 of the Service Regulations for permanent employees of the European Patent Office. A copy of that report was attached to the letter and the complainant was invited to submit his written comments thereon by 20 May 2015.

The complainant did not submit any comments. On 28 May 2015 the Disciplinary Committee held a hearing, but the complainant did not attend it, nor was he represented by another person. In its opinion of 28 May 2015, the Committee unanimously found that the complainant had breached Articles 14(1), 62(2), 62(3) and 63 of the Service Regulations and Rule 13 of Circular No. 22, and that by doing so he had failed to meet the standards of integrity expected from an employee, in violation of Article 5(1) of the Service Regulations. In reaching its conclusion the Disciplinary Committee acknowledged that there were indications that medical issues might have played a role in the complainant's behaviour, as there seemed to have been an evolution in his health from "fit to work" in June 2014, to "serious suspicions" of not being fit to work in October 2014, to signs of a serious mental illness in February 2015. The Committee nevertheless also noted that the information available to it on the complainant's state of health was not sufficient to understand whether the complainant had medical issues and to what extent these might have affected his behaviour. It added that the absence of any correspondence from the complainant had not allowed it to come to a meaningful conclusion about possible mitigating circumstances. The Committee unanimously agreed with the Administration's proposal for the imposition of the disciplinary sanction of dismissal under Article 93(2)(f), in the light of the fact that the complainant's breaches constituted gross misconduct and that the relationship of trust between the complainant and the EPO had irretrievably broken down.

By a letter of 1 July 2015, the President of the European Patent Office, the EPO's secretariat, informed the complainant that he had decided to dismiss him from service with immediate effect and to compensate him in lieu of the statutory period of notice. On 19 August 2015 the complainant submitted a request for review of that decision

asking that it be annulled, that he be reinstated or, alternatively, that an independent medical specialist be assigned to assess whether or not his mental illness could account for the alleged misconduct. By a letter of 25 November 2015, the President notified the complainant of his decision to reject his request for review in its entirety. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision and to order his retroactive reinstatement in status of incapacity with full payment of all salaries, benefits, step increases, pension contributions and other emoluments that he would have received from 1 July 2015 through his actual date of reinstatement. Alternatively, he asks the Tribunal to award him actual and consequential damages suffered as a result of his illegal dismissal, including the loss of salaries, benefits, pension contributions, terminal benefits and any other emoluments that he would have been entitled to as an EPO employee until his statutory date of retirement. He claims moral damages in the amount of 100,000 euros for the moral injury caused to him by his unlawful dismissal while he was sick and mentally incapacitated. He also claims costs and interest on all amounts awarded to him at the rate of 5 per cent per annum through the date that all such amounts are paid in full. He requests such other relief as the Tribunal deems fair and equitable.

The EPO requests that the Tribunal dismiss the complaint as unfounded in its entirety.

CONSIDERATIONS

1. The complainant commenced employment with the EPO in July 2003. His employment was terminated by the President on 1 July 2015 with immediate effect. The termination of the complainant's employment had been preceded by charges of misconduct laid against him on 4 May 2015. A Disciplinary Committee considered those charges and issued a report on 28 May 2015 recommending the complainant's dismissal.

2. The complainant requested a review of the 1 July 2015 decision, but his request was rejected by the President by a decision dated 25 November 2015. This is the decision impugned in these proceedings.

3. The EPO challenges the receivability of the complaint in one limited respect that, having regard to the conclusions of the Tribunal, is immaterial. The EPO does not otherwise raise receivability as an issue.

4. As will be discussed below, this complaint contains the material elements that were decisive features of a recent proceeding involving the EPO in which the judgment, Judgment 3887, was delivered in public on 28 June 2017. That is to say, the judgment in that matter was delivered after the pleas closed in the present proceedings. Accordingly and understandably, no reference was made to that judgment in the pleas. Nonetheless that judgment informs the conclusion the Tribunal should reach in this complaint.

5. In the present matter the Disciplinary Committee found that all the allegations of misconduct raised in a report dated 4 May 2015 made under Article 100 of the Service Regulations were proved. The alleged misconduct was first that the complainant was absent from work without permission on multiple occasions starting in November 2014 (Article 63 of the Service Regulations). The second was that the complainant had failed to co-operate during medical procedures, leading to the cancellation of a medical examination (Article 26(2) of the Service Regulations), though the Committee noted that this had already been the subject of a disciplinary measure. The third was that the complainant had travelled from his place of employment without permission while on sick leave (Article 62(3) of the Service Regulations). The fourth was that the complainant had failed to supply the EPO with information about his address and telephone number while on sick leave (Article 14(1) of the Service Regulations). The fifth was that the complainant had failed to be present at his normal place of residence during core hours while on sick leave (Circular No. 22, Rule 13). The sixth and last was that the complainant had failed to register his sick leave in due time (Circular No. 22, Rule 13).

To understand the background leading to the charges raised against the complainant and the findings of the Disciplinary Committee, it is desirable to refer to a number of events set out in the pleas. In the brief, prepared by a staff representative on behalf of the complainant, observations are made about the circumstances of the complainant and specifically about e-mails sent by the complainant in early 2014. Those observations were initially made in an e-mail dated 11 April 2014 from another staff representative to the complainant's supervisor. That staff representative recounted that he was concerned about the "case [of the complainant]" and that he had been told by the supervisor that "medical experts [were] afraid that he could harm himself, or people around him". The staff representative also recounted how he had reread e-mails that the complainant had sent him and noted that they were very garbled and incoherent, like those of someone close to breakdown. The staff representative then observed: "what he told you and me sounds like severe paranoid delusions". In the complainant's brief, it is said that "[the supervisor] did not deny the conversation or its contents and in fact implicitly acknowledged it". This account of the facts is not put in issue by the EPO in its reply. While it is but one small element in the overall background, it does illustrate that as early as April 2014, a view had been expressed to the complainant's supervisor that the complainant was suffering from a mental illness. While the views of the staff representative who wrote the e-mail of 11 April 2014 are not a medical opinion, they nonetheless cannot be dismissed as irrelevant in all the circumstances. Indeed two e-mails written by the complainant (on 18 February 2014 and 12 March 2014) in evidence (to which the complainant's supervisor was one recipient) show signs of delusional conduct.

6. On 21 May 2014 the complainant was examined by Dr F. His conclusions are summarised in a letter of 11 June 2014 to the complainant from the Head of the Human Resources Department. The letter informed the complainant that he was considered fully fit for work. The summary suggests Dr F. considered that the complainant was suffering from a medical condition but it did not affect his fitness for work.

7. Later in 2014 the complainant was required to submit to a medical examination by a psychiatrist in the Netherlands. The psychiatrist's report dated 20 October 2014 is part of the material before the Tribunal. It reveals that the psychiatrist believed there was a problem with the complainant and that "although there was not enough information for a medical diagnosis, there [was] a serious suspicion that there [was] a medical condition". The report is a redacted version in the sense that the condition is simply identified as "XXXXXX". The psychiatrist expressed the view that he thought this condition did affect the complainant's fitness for work, "to the extent that in cooperation his thoughts and ideas will interfere with normal communication" and observed that he "seriously doubt[ed] that [the complainant was] able to interact normally". A number of related conclusions are expressed in a qualified way because of "lack [...] [of] information". An inference can be drawn from a later discussion by the Disciplinary Committee that the condition adverted to in this report was mental illness.

8. In November 2014 two EPO staff members visited the complainant at his home following an absence from work of several days. One of the staff members was the complainant's supervisor. The supervisor asked the complainant about his absence and in a written report of the visit dated 24 November 2014 it is said that: "Asked by [the supervisor] about his absence, [the complainant] mentioned that he could not come to work as he had to take care of himself due to (non-physical) attacks from authorities, EPO, neighbours, other ethnic groups. Due to the incoherence of his talking this cannot be correctly reproduced." Again, these comments of the complainant may have been manifestations of a mental illness.

9. Also in the material before the Tribunal is a medical report dated 6 February 2015 that was considered by the Disciplinary Committee when it met on 28 May 2015. The report was from a medical practitioner in Senegal, the complainant's country of origin and to which, by then, he had returned. The conclusion of that medical practitioner was that the complainant was suffering from a mental illness. The Disciplinary

Committee said the following about this report in a footnote to its opinion:

“The Office did not accept the sick note issued in Senegal, dated 6 February 2015 [...]; the committee was able to confirm via the internet that the treating physician, and the clinic on whose letterhead the sick note was written, both exist. In terms of content, the sick note is also generally in line with the medical report written in October 2014 by a doctor in the Netherlands. Thus, the committee decided that the Senegalese report could be an indicator of an ongoing health issue.”

10. In the body of its opinion, the Disciplinary Committee said that it “acknowledged that there were indications in the file that medical issues may have had a role to play in the [complainant’s] behaviour” and then referred to the June 2014 medical opinion that the complainant was fit to work, the October 2014 psychiatrist’s report that there were “serious suspicions” that the complainant was not fit for work and the February 2015 report that the complainant suffered from a mental illness. The Disciplinary Committee then went on to say: “This, however, was all the information available to the committee on the [complainant’s] state of health, and certainly not sufficient to understand precisely whether he had medical issues, and to what extent they may have affected his behaviour.” It is not clear what is meant by the word “precisely” in this context. While the medical evidence before the Disciplinary Committee may not have revealed a detailed and comprehensive diagnosis, it clearly pointed to a conclusion that, at least by the time the Disciplinary Committee was deliberating, the complainant was suffering from a serious mental illness.

11. Following the opinion of the Disciplinary Committee recommending dismissal, the President wrote to the complainant on 1 July 2015 informing him of his decision to dismiss him. No reference is made in this letter to the possibility that the complainant may have been suffering from a mental illness and that that illness may have contributed, in whole or in part, to the conduct that founded the President’s conclusion that the complainant’s behaviour amounted to serious and gross misconduct.

12. The request for the review of this decision, dated 19 August 2015, was prepared by the complainant's brother and a staff representative. The gravamen of the grounds were that "the alleged acts of unauthorised absences and lack of cooperation were not the result of negligence or insubordination, but that of mental incapacity" and that disciplinary measures were not appropriate but medical care was.

13. The substance of the President's response to the request for review on 25 November 2015 was to say:

"[T]here were no medical statements certifying that there is, as you allege now *a posteriori*, 'a connection between [your] mental health and the acts alleged to amount to misconduct'. In fact, by your actions, i.e. your continuous unauthorised absence in Senegal and your lack of co-operation, the Office was effectively deprived of a possibility to check and certify the status of your health."

and that:

"In any event, during the disciplinary procedure, and even now, the information provided in the file does not bring evidence that the pathology you alleged to suffer caused the inappropriate behaviour."

14. While, in detail, the circumstances considered in Judgment 3887 are different to the circumstances arising in these proceedings, the fundamentals are the same. That is to say, there were significant indicators that the complainant's behaviour, found to be misconduct, could be explained by mental illness and, additionally, the complainant had not cooperated fully in submitting to medical examinations which may have provided comprehensive diagnoses.

15. The Tribunal said in Judgment 3887, consideration 13, that:

"[T]he President's decision to dismiss the complainant [...] is vitiated by the fact that neither the President, nor the Disciplinary Committee could have made a proper assessment of the allegations without taking into account whether the complainant acted intentionally, and in control of his faculties, or if the complainant suffered from a mental illness that prevented him from behaving in accordance with his obligations as a permanent employee. Therefore, the principle of due process and the duty of care require the Disciplinary Committee in accordance with Article 101(3) of the Service Regulations (which provides that '[i]f the Disciplinary Committee requires

further information concerning the facts complained of or the circumstances in which they arose, it may order an inquiry in which each side can submit its case and reply to the case of the other side') to order a medical assessment of the complainant by an expert, and the convening of a Medical Committee if necessary. The medical expert(s) shall also take into consideration all documents in the file submitted to the Tribunal.”

While, in the present case, the Disciplinary Committee, but not the President when deciding initially to dismiss the complainant, did advert to the possibility that the complainant was suffering from a mental illness, it discounted entirely the possible nexus because the information available was insufficient. In circumstances such as the present, the President’s response to the complainant’s request for review was inadequate. The Tribunal concluded in Judgment 3887 that the EPO breached its duty of care towards the complainant in that case. So it is in this case as well. That duty of care would involve the EPO assessing whether the alleged misconduct can be entirely explained by the complainant’s mental illness, and also whether the complainant was entitled to benefits based on an invalidity stemming from his mental illness and perhaps his service with the EPO.

16. In light of the above, it is appropriate to grant the same relief to the complainant in these proceedings as ordered by the Tribunal in Judgment 3887. Accordingly, the decision of 25 November 2015 will be set aside in the part regarding confirmation of dismissal for misconduct in accordance with Article 93(2)(f) of the Service Regulations, as will the same part of the earlier decision of 1 July 2015. The case will be sent back to the EPO for further consideration by the Disciplinary Committee, which will request a medical assessment of the complainant’s health (even, if necessary, only on the basis of documents) and, if necessary, the convening of a Medical Committee. In the circumstances, no order will be made for reinstatement.

17. The complainant is entitled to moral damages stemming from the unlawful decision to dismiss him, which the Tribunal sets in the amount of 20,000 euros.

18. The complainant is also entitled to an award for costs, which the Tribunal sets in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The decision of 25 November 2015 is set aside in the part regarding confirmation of dismissal for misconduct in accordance with Article 93(2)(f) of the Service Regulations, as is the same part of the earlier decision of 1 July 2015.
2. The case is sent back to the EPO in accordance with considerations 15 and 16, above.
3. The EPO shall pay the complainant 20,000 euros in moral damages.
4. It shall also pay him 1,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 2 November 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 6 December 2017.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ