C. (No. 13)

v.

EPO

135th Session **Judgment No. 4633**

THE ADMINISTRATIVE TRIBUNAL,

Considering the thirteenth complaint filed by Mr P. C. against the European Patent Organisation (EPO) on 28 September 2018, corrected between 6 and 9 February 2019 and on 11 August 2020, the EPO's reply of 27 June 2019, the complainant's rejoinder of 14 October 2019, the EPO's surrejoinder of 28 February 2020, the complainant's further submissions of 11 August 2020 and the EPO's final comments of 29 September 2020;

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 challenges the decision to impose on him the sanction of demotion.

Facts relevant to this case may be found in Judgment 3958, on the complainant's third complaint, and in Judgment 3960, on the complainant's fifth complaint, both delivered in public on 6 December 2017, as well as Judgment 3961, on the complainant's sixth complaint, delivered in public on 24 January 2018. Suffice it to recall that, on 3 December 2014, the complainant, a member of an EPO Board of Appeal, was informed that he was accused of systematically and repeatedly disseminating defamatory information to the detriment of the EPO and of the personal

reputation of members of the Administrative Council, of the President of the European Patent Office, the EPO's secretariat, and other staff.

The Head of the Investigative Unit informed the complainant on 3 December 2014 that, in accordance with Circular No. 342, the Investigative Unit had received an allegation of misconduct and that a review of that allegation was being conducted. He provided him with details of the allegation made.

By decision CA/D 12/14 of 11 December 2014, the Administrative Council, which was the complainant's appointing authority, suspended him from service with immediate effect pending the investigation into alleged serious misconduct. He was no longer permitted to enter any EPO premises unless a specific authorisation to that effect had been granted. He was requested to hand over any EPO property that may be in his possession and his user ID was blocked. The Administrative Council added that the Investigative Unit was the competent body to pursue this investigation and to deliver its report to the Administrative Council and to the President of the Office. On the basis of this investigation, the Administrative Council would decide on the appropriate next steps.

In March 2015 the Administrative Council informed the complainant that, based on the proposal of the Chairperson of the Administrative Council of 18 March 2015, it had decided to initiate disciplinary proceedings against him and to continue his suspension until the end of the disciplinary proceedings.

On 23 June 2015 the Disciplinary Committee issued its opinion on the disciplinary proceedings against the complainant. It concluded that he had committed misconduct, which was incompatible with the proper carrying out of his duties. In October 2015 the Administrative Council requested the Enlarged Board of Appeal (EBA) to make a proposal for the removal from office of the complainant, explaining that the Disciplinary Committee had considered that the appropriate sanction for the complainant's serious misconduct was dismissal pursuant to Article 93(2)(f) of the Service Regulations for permanent employees of the Office. In light of the serious misconduct established by the Disciplinary Committee, the suspension decision was extended, with half of the complainant's basic salary being withheld until a final decision

was taken. Criminal proceedings were initiated against the complainant in national courts.

By decision CA/D 19/17 of 10 October 2017 the Administrative Council maintained the decision to suspend the complainant from duties given the ongoing national criminal proceedings and the risks to the operations of the Boards of Appeal and the Organisation as a whole.

On 13 December 2017 the Administrative Council issued decision CA/D 23/17 stating that the complainant had engaged in misconduct incompatible with the proper carrying out of his duties. Taking note of the EBA's refusal to propose that the complainant be removed from office, the Administrative Council decided to impose on him the sanction of demotion to the lowest grade and step in his job group. It noted that his suspension became ineffective following Judgments 3958 and 3960 and therefore withdrew the suspension decision, while recalling that the complainant was under the authority of the President of the Boards of Appeal, who would take appropriate steps towards his reinstatement until the end of his mandate on 31 December 2017. It refused to reimburse his costs.

On 12 March 2018 the complainant requested a review of the "final" decision CA/D 23/17 and the interim decision CA/D 19/17, alleging in particular that the Administrative Council erred in relying on the findings of the Disciplinary Committee, which were tainted by serious procedural and substantive defects. He also alleged that the disciplinary proceedings were flawed by breach of due process and that he was the victim of a "personal vendetta pursued [...] by the President of the Office and other senior officials".

On 27 June 2018 the Administrative Council issued decision CA/D 7/18, rejecting the complainant's request for review as unfounded. That is the decision the complainant impugns in his present complaint.

The complainant asks the Tribunal to quash "ab initio" the impugned decision of 27 June 2018, the original decision CA/D 23/17 of 13 December 2017, which is the "final decision in the disciplinary procedure D1/2015", and all interim decisions associated with the disciplinary proceedings D1/2015 – in particular decision CA/D 12/14 insofar as it has not already been set aside by Judgment 3958 –, the

interim decision to initiate internal disciplinary proceedings against him adopted at the Administrative Council's 143rd meeting (25 and 26 March 2015), decision CA/D 14/15 of 15 October 2015 insofar as it has not already been set aside by Judgment 3960, the interim decision to "suspend" the disciplinary proceedings following the EBA decision of 14 June 2016 in case No. Art. 23 1/16, and decision CA/D 19/17 of 10 October 2017. He also asks the Tribunal to examine and decide on the lawfulness of the following general decisions, which afforded a basis for the impugned decision: the reform of the internal appeal system enacted by decisions CA/D 8/12, CA/D 9/12 and CA/D 10/12; the amendments made to Article 95 of the Service Regulations introduced by decision CA/D 18/15 of 17 December 2015; Circular No. 342; the "Guidelines for the Protection of Personal Data in the European Patent Office"; and the compliance of the provisions of decision CA/D 3/15, in particular Article 12a of the Rules of Procedure of the EBA, with the legal order defined by the European Patent Convention.

He seeks an award of material and moral damages for the "financial liabilities improperly imposed upon him" and for the impairment of his dignity and health. He further seeks an award of exemplary damages for the egregiously unlawful manner in which the disciplinary proceedings were conducted. He claims reimbursement of the costs incurred with respect to the investigative and disciplinary procedures as well as the costs incurred in pursuing his complaint before the Tribunal and the "preceding requests" to the Administrative Council. He also claims interest on all amounts awarded at the rate of 5 per cent per annum, from the date of the judgment through the date all said amounts are fully paid. Lastly, he claims such other relief as the Tribunal determines to be just, necessary, appropriate and equitable.

In addition, he asks the Tribunal to order the defendant to disclose "all materially relevant documents and information" which have been improperly withheld from him and that upon disclosure he be given an opportunity to comment. He also asks the Tribunal to order the defendant to return immediately the USB key it seized together with "all other items of [his] property improperly and unlawfully confiscated by the Investigative Unit".

In the rejoinder, the complainant claims additional moral damages based on an alleged flawed implementation of Judgments 3958 and 3960. He adds that he suffered additional material and moral injuries pursuant to the publication of prejudicial and defamatory information on an internet blog.

The EPO asks the Tribunal to dismiss the complaint as irreceivable insofar as the complainant's claims relate to the suspension decision as these claims are without purpose. His complaint is also irreceivable insofar as he challenges general decisions in the abstract. It considers his complaint otherwise devoid of merit. In its surrejoinder, the EPO asks the Tribunal to reject the claim for additional moral damages related to Judgments 3958 and 3960 as irreceivable given that this claim is new.

CONSIDERATIONS

1. The complainant is a member of staff of the EPO. This is his thirteenth complaint. The evidentiary documentation in these proceedings, mainly furnished by the complainant, is constituted by eight full lever arch folders. The complainant's brief, without annexures, is 346 pages and his rejoinder is 390 pages without annexures as well as his additional submissions of 92 pages. He raises a multiplicity of issues.

The complainant has requested oral hearings but the Tribunal is satisfied it can fairly and appropriately address the complaint on the written submissions and evidence of the parties.

2. It is convenient to deal at the outset with one issue he raises which is of apparent substance. In order to address this issue, it will be necessary to refer to the Opinion of the Disciplinary Committee of 23 June 2015, the initial decision of the Administrative Council (CA/D 23/17) of 13 December 2017 finding the complainant guilty of misconduct and sanctioning him (the Initial AC Decision) and the decision of the Administrative Council (CA/D 7/18) of 27 June 2018 reviewing the Initial AC Decision (the AC Review Decision). The issue is whether the appropriate standard of proof, beyond reasonable doubt,

was applied in determining the complainant's guilt. The focus of this argument was the approach of the Disciplinary Committee though also relevant is the approach of the Administrative Council.

3. In its Opinion, the Disciplinary Committee addressed, at several points, the quality of the evidence and its level of satisfaction about proof of relevant facts. The Opinion was structured in the following way. There was first an introduction and then a section setting out the factual background. This was followed by sections addressing the role of the Committee, the complainant's legal submissions, the legal background, the legality of the promulgation of guidelines, whether the guidelines had been followed and the consequences of any illegality. The Committee then addressed, importantly, the evidence against the complainant, drawing significantly on the Investigation Report of 5 March 2015 of the Investigative Unit. The Committee addressed the evidence by reference to five headings it had identified in the introduction, being the several allegations of misconduct against the complainant. It is only necessary to refer to the first two headings as it was only this conduct, identified in the final section ("CONCLUSION"), which founded the Committee's ultimate conclusion that the complainant was guilty of misconduct warranting a sanction of dismissal. The first of the two headings, described as "Issue 1", was the "[u]nauthorised disclosure of non-public information and critical opinions related to [EBA] activities outside the EPO while using pseudonyms". The second of the headings, described as "Issue 2", was the "[s]preading [of] false accusations and unjustified attacks or threats against the EPO and its members, either directly or indirectly using anonymous statements and pseudonyms".

4. Issue 1 concerned the use of an email address (based on Robert Blum, the name of a German democratic politician and folk hero of the 19th century) to communicate with an independent German lawyer and sending him confidential internal EPO information. Additionally, the sending of a letter to a person external to the EPO (and a critic of the EPO), a draft of which was on a memory stick taken from the complainant and, as to the draft, made reference to the above-mentioned email address as a place to which a reply could be sent. In submissions

made by the complainant to the Committee it was argued that the assertions (conclusions underpinning the EPO's case) were based on "nothing more than speculation and conjecture". This submission was rejected by the Committee, which said:

> "[...] the assertions are properly based on the available evidence which, although not complete in every respect, is sufficiently detailed and probative for those conclusions properly to be drawn".

The Committee had earlier said:

> "Drawing all these matters together, this evidence is sufficient to satisfy the [Committee] that Robert Blum was a pseudonym used by [the complainant] and that it was [the complainant] who used the email address"

(referred to at the commencement of this consideration).

These were the only comments by the Committee, at this point in its Opinion, about the quality of the evidence and resultant proof of Issue 1.

5. Issue 2 concerned, in particular, the sending or preparation of four messages (one of which was a draft) and two letters.

6. Firstly, as to the draft message (alleging, in effect, high level corruption in the EPO), the Committee was satisfied, it appears, that it had been sent multiple times from a specified email address (the gmex address) and that "the [...] evidence [was] sufficient to satisfy [the Committee] that [the complainant] was the user of the [gmex] email address and drafted the letters [...]". In relation to one communication (it appears from the gmex address) to a Swedish politician, the Committee said, in relation to the draft letter, that it could not be sure that this was the letter which was attached to an email to the politician but considered "that it was overwhelmingly likely that it was".

7. Secondly, in relation to an email sent to the Director 0.6, the Committee said: "[i]n the absence of any explanation by [the complainant] of these facts we are satisfied that he sent this e-mail". Thirdly, in relation to two emails sent to the Vice-President of Directorate-General 5, the Committee said: "[i]n the absence of any alternative explanation of these facts we conclude that these e-mails were sent by [the complainant]".

Fourthly, in relation to a template letter sent to participants in a seminar, the Committee concluded: "[t]aking all this material together and in the absence of any explanation by [the complainant] we are satisfied that he was responsible for circulating the envelopes containing the material [...] to the delegates [and by email from the Robert Blum email address] and the letter to [a named individual]". Fifthly, in relation to a letter purportedly sent to a Croatian politician, the Committee said: "[the] evidence is in our opinion insufficient to satisfy us that the letter was indeed sent". Sixthly and lastly, in relation to a letter sent to the Deputy Mayor of a local council in France (of which the President of the EPO was a town councillor), the Committee said: "[t]hese facts are more than sufficient, in the absence of any plausible explanation, to satisfy us that [the complainant] [...] sent the letter [...]".

8. In the first paragraph of the "CONCLUSION", the Committee said:

> "The [Committee] is satisfied on Issues 1 and 2 [...] that [the complainant] did carry out the acts alleged against him. In doing so we have not had to draw any conclusions from [the complainant's] failure to cooperate with the investigating authority. In our opinion, the evidence adduced was of itself more than sufficiently probative to prove the Administrative Council's case."

9. It can be seen (and this is conceded by the EPO) that at no point does the Committee refer to the standard of proof applicable in proceedings alleging misconduct, namely beyond a reasonable doubt. It may be doubted that the all-encompassing expression in the "CONCLUSION" of "more than sufficiently probative" should be taken to replace earlier clear intimations that the evidence was simply "sufficient". In the result, the assessment of the Committee was either that evidence was "sufficient", "sufficiently detailed and probative", an event was "overwhelmingly likely" to have occurred or evidence was "more than sufficient".

10. There are several judgments of the Tribunal deprecating reliance simply on the sufficiency of evidence as establishing misconduct in disciplinary proceedings. One illustration is found in Judgment 3880, consideration 9, in which the Tribunal said:

> "Whether there is sufficient evidence to support a finding of misconduct is a far less onerous evidentiary burden than the requisite 'beyond a reasonable doubt' standard of proof. The application of the incorrect standard of proof is a fundamental error of law and requires, on this ground alone, that the impugned decision be set aside."

Similarly in Judgment 4360, consideration 12, the Tribunal said: "[t]here is a material difference between being satisfied there was sufficient evidence establishing a fact and being satisfied beyond reasonable doubt that the fact existed".

11. The language used by the Committee casts real doubt on whether it turned its mind to the appropriate standard of proof. An illustration is found in the Committee's consideration of the letter sent to the Swedish politician referred to in consideration 6 above. The Committee prefaced its conclusion as to whether the letter was sent by saying "we cannot be sure that this was the letter that was attached" to the email to the Swedish politician but that "it was overwhelmingly likely that it was". The first part of this formulation manifests doubt. While it is true that the second part manifests a high degree of confidence, it is difficult to say with any certainty that applying the standard of beyond reasonable doubt, the Committee would have come to the conclusion it did.

12. Had the Committee been the final arbiter of the question of whether the complainant was guilty of misconduct, its decision would have been set aside. But it was not. It was the Administrative Council in, first, the Initial AC Decision and, subsequently, in the AC Review Decision. However, in both decisions the conclusion of the Administrative Council is substantially dependent on the conclusions of the Disciplinary Committee. It is unnecessary to dwell on the Initial AC Decision save to note that, somewhat curiously, it does not articulate expressly the standard of proof but rather simply refers to judgments of the Tribunal, by judgment number, addressing that topic.

13. However, in the AC Review Decision, the decision impugned in these proceedings, there is a comparatively lengthy discussion of the topic of burden of proof in paragraph 7 of that decision. It synthesises the Tribunal's case law. However, what is not then manifest in the decision,

is any independent consideration by the Administrative Council of the evidence leading to the ultimate conclusion that "the decision on the sanction shall be upheld". Rather, in paragraphs 11 to 16 the Council refers to, and expressly relies on (many times saying either the Disciplinary Committee "concluded [...]" or the Disciplinary Committee "was satisfied [...]") what the Committee concluded on each specific factual issue (arising in Issue 1 and Issue 2), culminating with the Administrative Council's conclusion in paragraph 17 that the Committee had taken a balanced approach and, in paragraph 18, that it had found the findings of the Committee convincing and fully endorsed its opinion. By relying extensively on the conclusions of the Committee, the Administrative Council infected its consideration of the proof of the complainant's alleged misconduct with the flaw in the Committee's analysis earlier discussed.

14. In the result, and quite apart from the multiplicity of other issues raised by the complainant, the AC Review Decision should be set aside, and the matter remitted to the EPO for further consideration of the charges against the complainant.

15. However, one further argument of the complainant should be addressed briefly. The complainant was a member of a Board of Appeal constituted under Article 23 of the European Patent Convention. The import of the argument appears to be that as a Board of Appeal member, the complainant had a measure of immunity from disciplinary proceedings. It is true that Article 23 addresses removal from office of Board of Appeal members. But there is no warrant for treating the complainant, having regard to his status, as immune from disciplinary proceedings under the Service Regulations. He was not and the Administrative Council, as the appointing authority, had power to pursue and decide allegations of misconduct against the complainant and, if proved, sanction him as it did.

16. In his brief, and additional submissions, the complainant seeks a miscellany of orders concerning a range of decisions and normative legal documents travelling well beyond the relief contemplated by

Article VIII of the Tribunal's Statute. He also makes more orthodox claims for moral and material damages as well as exemplary damages. Exemplary damages may be awarded if a complainant has provided persuasive evidence and analysis to demonstrate that there was bias, ill will, malice, bad faith or other improper purpose attending the impugned decision (see, for example, Judgment 4181, consideration 11). He asserts this is so in the present case. However, what cannot be overlooked is that it simply cannot be said that the disciplinary proceedings against the complainant were unwarranted. They plainly were justified. While the opinion of the Disciplinary Committee was flawed in the way already discussed, as was the impugned decision, the Committee's analysis nonetheless reveals a case against the complainant which is not devoid of substance. If it is proved, his conduct was egregious. It is simply untenable for the complainant to adopt the position, as he effectively does, of simply being an innocent victim of persecutory conduct within the EPO. Exemplary damages are not warranted.

17. Insofar as he seeks moral damages, he identifies in his brief, under a heading "Moral injuries", a range of events or conduct which have caused him to "[suffer] significant moral injuries". He does not particularise what those "injuries" are, let alone prove them as he must do (see Judgment 4306, consideration 19). However, under two other headings, namely "Injury to dignity and reputation" and "Professional injury" (which may, in appropriate cases, sound in moral damages), he asserts, but again does not prove, any injury. Again, under a separate heading, namely "Deleterious effects on the Complainant's health" (again which may, in appropriate cases, sound in moral damages), the complainant asserts the existence of moral injury but does not seek moral damages. Rather he says that the adverse effect on his health of the EPO's abusive conduct towards him since 3 December 2014 is to be regarded as a service-induced illness. If so, there are mechanisms under the Service Regulations to obtain compensation for such an injury. In any event and more generally, if (as just discussed) the maintenance of disciplinary proceedings against the complainant was warranted, the Organisation should not be held liable by an award of moral damages, for the consequences of bringing such proceedings.

18. The observation in the last sentence of the preceding consideration is equally applicable to two elements of the complainant's claim for material damages, namely loss of income due to service-induced illness and loss of opportunities to be considered for promotion. A significant element in the claim for material damages concerns legal costs attending internal processes associated with or arising from the complainant being charged with misconduct. As a general principle, the Tribunal does not award costs for internal processes other than in exceptional cases (see Judgments 4554, consideration 8, and 4491, consideration 24). This is not such a case. Finally, the complainant seeks material damages for what he describes as "the abrogation of the so-called 'nominal guarantee'". If, in fact, an administrative decision was expressly or impliedly made (as it seemingly was on 22 February 2018) depriving the complainant of a payment due, then that decision ought to have been impugned in the ordinary way. These proceedings are not a vehicle for any incidental grievance the complainant may have.

19. In the result, the complainant has established the impugned decision should be set aside. He has not been legally represented but is nonetheless entitled to costs for these proceedings assessed in the sum of 1,000 euros.

DECISION

For the above reasons,

1. The decision of the Administrative Council of 27 June 2018, being decision CA/D 7/18, is set aside.

2. The matter is remitted to the EPO for further consideration and determination of the charges against the complainant addressed in the decision referred to in point 1 above.

3. The EPO shall pay the complainant 1,000 euros costs.

4. All other claims are dismissed.

In witness of this judgment, adopted on 20 October 2022, Mr Michael F. Moore, President of the Tribunal, Ms Rosanna De Nictolis, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

ROSANNA DE NICTOLIS

HONGYU SHEN

DRAŽEN PETROVIĆ