

H. (No. 24)

v.

EPO

126th Session

Judgment No. 4047

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-fourth complaint filed by Ms E. H. against the European Patent Organisation (EPO) on 10 June 2016 and corrected on 20 August, the EPO's reply of 14 December 2016, corrected on 7 February 2017, the complainant's rejoinder of 26 May, corrected on 19 June, the EPO's surrejoinder of 7 August 2017, the EPO's additional submissions of 8 March 2018 by which it forwarded a document requested by the President of the Tribunal and the complainant's legal representative's email of 24 April 2018;

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 her with immediate effect the disciplinary measure of dismissal for serious misconduct.

By an email of 4 September 2015 the Head of the Investigative Unit (IU) notified the complainant, who was at that time a staff representative and a permanent employee of the European Patent Office (the EPO's secretariat), that the following allegations of misconduct had been made against her: that she had orchestrated and promoted, or assisted in orchestrating and promoting, a harassment campaign directed

against an elected member of the Central Staff Committee in autumn 2014, and that, in December 2014, she had threatened some staff members during a meeting of the Munich Local Staff Committee. She was requested to meet with the IU for an interview on 10 September 2015. Her attention was drawn to the obligation to maintain confidentiality on her case, which was referenced as C-071, including with respect to that communication. A few days later the Staff Union of the European Patent Office (SUEPO) published on its website a redacted copy of the email, but the author's name remained. The Principal Director of Human Resources wrote to the complainant on 10 September stating that the disclosure of a strictly confidential email might amount to a breach of the obligation to act in accordance with the highest degree of integrity and that the Office reserved its right to take appropriate action against her.

In October 2015 the IU reviewed the background of case C-062, which it had investigated earlier concerning the conduct of another employee. The investigation concerned a campaign of unauthorised disclosure and publication of confidential information as well as the sending of threatening and defamatory messages to politicians, bloggers and staff.

On 9 November 2015 the Head of the IU notified the complainant that the IU was reviewing further allegations of misconduct made against her; the case was referenced as case C-062b. She was accused of having assisted and/or cooperated with another employee in repeatedly disseminating defamatory information to the detriment of the EPO and of members of the Administrative Council, the President of the Office, the Vice-President of Directorate-General 4 (DG4) and others. She was also accused of having disclosed without authorisation non-public information, thereby causing severe risk to the EPO's public image and reputation, as well as to the personal reputation of members of the Administrative Council, the President of the Office, the Vice-President of DG4 and others. On 13 November the IU issued a summary of its findings. It concluded that the complainant had committed misconduct by actively participating in the campaign conducted by the staff member who was the subject of case C-062, and by failing to cooperate during

the investigative procedure, in particular by refusing to appear at a hearing and refusing to comply with the request of the IU to disclose some emails that had been sent from her private email account to another private account.

On 17 November 2015 the complainant was informed that, having carefully considered the report of the IU on case C-071 and the summary findings of the IU in case C-062b, the Office had decided to refer the matter to a Disciplinary Committee and to suspend her from duties until further notice. The Disciplinary Committee issued its opinion on 11 December 2015 after having examined the three sets of charges made against the complainant: unauthorised disclosure of internal, confidential and personal material, alleged “threats/harassment” of EPO staff, and inappropriate behaviour in the course of the investigation and disciplinary procedures. It concluded that the three sets of charges were valid and that there were aggravating circumstances. It emphasised that, in light of the complainant’s behaviour during the hearing and her past actions, her behaviour was likely to continue and therefore concluded that the appropriate sanction was dismissal.

On 15 January 2016 the President informed the complainant that he had decided to impose on her the disciplinary measure of dismissal with immediate effect and with a 20 per cent reduction of her pension on the ground that her behaviour amounted to serious misconduct and that the relationship of mutual trust and confidence had irretrievably and permanently broken down.

On 28 January the complainant requested him to review his decision. The President informed the complainant by a letter of 21 March 2016 that he had decided to maintain the decision to dismiss her but that there would be no reduction of her pension. In accordance with the applicable provisions, the complainant filed a complaint with the Tribunal impugning that decision.

The complainant asks the Tribunal to dismiss all the charges laid against her and to order her “unconditional” reinstatement with retroactive effect, including the payment of salary, benefits, step increases, pension contributions, all entitlements and “emoluments” she would have received from 16 January 2016 to the date of her reinstatement. She also

asks the Tribunal to order the EPO to award “her full measure of actual and consequential damages suffered as a result of the illegal dismissal”. If the Tribunal decides not to order her reinstatement, she seeks compensation for the loss she has incurred, based on the salary, benefits, pension contributions, “terminal benefits” and other “emoluments” to which she would have been entitled from the date of her dismissal to the date of her statutory retirement, which would be 31 December 2022. She further seeks moral and exemplary damages. She claims 35,000 euros for the costs incurred with respect to the present proceedings as well as the disciplinary proceedings. She asks the Tribunal to award her interest at the rate of 5 per cent per annum, from 16 December 2016 to the date of payment, on all amounts due to her. She further asks the Tribunal to order any other relief that it deems fair or necessary.

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

CONSIDERATIONS

1. Until 15 January 2016 the complainant had been a member of the staff of the EPO. She had then been employed by the Organisation for well over 25 years. By letter of that date from the President, the complainant was informed she was dismissed with immediate effect and her pension would be reduced by 20 per cent. During the preceding months, the complainant had, on several occasions, been charged with a number of counts of misconduct. The allegations of misconduct were, in due course, considered by a Disciplinary Committee. In its reasoned opinion of 11 December 2015, the Committee set out, at some length, the background and context which had led to its consideration of the allegations of misconduct. It did so under the headings “Introduction”, “General Observations” and “Formal Requests”. In the last mentioned section of the report, the Disciplinary Committee dealt with seven requests, generally of a procedural nature, made by or on behalf of the complainant.

2. The Disciplinary Committee then addressed the charges grouping them into three sets. The first set involved allegations of unauthorised disclosure of EPO internal, confidential and personal material. The second set involved allegations that the complainant had threatened or harassed EPO staff. The third set involved allegations that the complainant had engaged in inappropriate behaviour in the course of the investigation and disciplinary procedures. The final section of the report was headed “Concluding Remarks”. In this section the Committee said that it had concluded unanimously that “all three charges against [the complainant were] valid” followed by observations about the likelihood of such conduct continuing, that it involved a “permanent breach of trust in the employee/employer relations” and that the appropriate sanction was dismissal.

3. Following receipt of the letter of 15 January 2016, the complainant requested a review of the decision. She did so on 28 January 2016. By decision dated 21 March 2016, the President partially granted the request. He adhered to the decision to dismiss the complainant. However he decided there should be no reduction of pension rights. This is the decision impugned in these proceedings before the Tribunal.

4. In her brief, the complainant advances six legal arguments though some have several elements and, to some extent, they overlap. The first legal argument is that the impugned decision is unlawful as the acts in question leading to the first two charges against the complainant were not established at all (much less beyond reasonable doubt), and the acts leading to the third charge did not constitute misconduct. The second legal argument is that the investigations against the complainant contain multiple irregularities, with repeated violations of the complainant’s right to due process and privacy. The third legal argument is that the disciplinary proceedings were tainted with procedural irregularities and were conducted in violation of the complainant’s right to a fair trial, and were tainted as well by material errors of law and mistakes of fact. The fourth legal argument is that the disciplinary sanction imposed on the complainant resulted from the application of an improper standard of proof and, in any event, the acts in question did not constitute

misconduct, let alone serious misconduct warranting dismissal. The fifth legal argument is that the original and final decisions were motivated by extraneous interests and formed part of an ongoing pattern of harassment against the complainant. The decisions, so it is argued, were the result of the President's continuing and deeply entrenched personal bias and prejudice against the complainant. The sixth and final legal argument was based on an allegation of retaliation.

5. It is convenient to deal with the fourth legal argument at the outset. The complainant argues that the appropriate test is "beyond a reasonable doubt" and that test was not applied. The EPO disputes in its reply this is the test and, in any event, effectively says that "much of the conduct was admitted by the complainant".

6. Overall, the case law of the Tribunal is clear and consistent. It was recently referred to in Judgment 3863, consideration 8 (see, also, Judgment 3882, consideration 14, as another recent example), in which the Tribunal said:

"[A]ccording 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)."

It is legally irrelevant, for the purposes of the Tribunal's judicial determination of the complaint, that, as the EPO points out in the reply, the same formulation is used in the English common law to establish the standard of proof in criminal proceedings.

7. The real issue is whether that standard was applied in the consideration of the allegations against the complainant both before the Disciplinary Committee and in the deliberations of the President. The contention of the EPO that the complainant admitted the conduct founding the charges of misconduct is not supported by the material. It may be that things were said or positions adopted by the complainant

at various points in the process leading to the decision in January 2016 to dismiss her which might be thought to constitute express or tacit acceptance of the facts concerning her conduct and her reasons underlying her conduct. They may constitute admissions against interest which, in an evidentiary sense, are relevant in determining what were the facts. An example is recorded in the Disciplinary Committee's report concerning the third set of charges and referred to later. But the complainant's clear and final position is reflected in a document dated 5 January 2016 sent to the EPO after the report of the Disciplinary Committee and before the decision was initially taken to dismiss her. In that document the complainant's legal representative said:

“For the avoidance of doubt, my client emphatically denies having committed any misconduct. She denies in particular having distributed defamatory material about [the Vice-President of DG4], having knowledge of the alleged establishment of a technical Dark Web TOR network and other, similar means (which due to the fact of the proxy settings of the Office is impossible), having knowledge that confidential EPO material [...] is being distributed to third parties, having harassed or threaten[ed] other staff representatives or hav[ing] behaved in an inappropriate way as she disclosed to staff the unlawful acts of the Office and the abuse of power.”

8. While this denial may not apply to each and every aspect of the charges against the complainant, it does make clear that she broadly put in issue both the fact that she engaged in the alleged conduct and the motivation attributed to her for her conduct. This position adopted by the complainant imposed an obligation on the EPO to assess the material by applying the test of beyond reasonable doubt.

9. The test referred to in consideration 6 above is to be applied by the decision-maker who has to decide whether there has been misconduct and the appropriate sanction. Usually that is the executive head of an organisation or her or his delegate. However it is also a test to be applied by bodies such as a disciplinary committee, though whether it does in any given case will ultimately depend on the role such a body has under the organisation's rules. Under Article 102 of the Service Regulations for permanent employees of the Office, the Disciplinary Committee is obliged to deliver a reasoned opinion on the

disciplinary measure appropriate to the facts complained of and transmit the opinion to, in this case, the President. This could only be done if the Disciplinary Committee concluded that the staff member had, on the facts, engaged in misconduct warranting a disciplinary measure. Plainly enough, the Disciplinary Committee must be satisfied that the evidence establishes beyond reasonable doubt that the misconduct occurred. There would be no utility in the Disciplinary Committee applying some other standard before reporting to the President.

10. In its opinion of 11 December 2015 concerning the complainant's conduct, the Disciplinary Committee made an observation of apparently general application to the matter before it, that "[a] more straightforward consideration of the [Disciplinary Committee] is whether there exists independent evidence to substantiate each and every one of the charges made against [the complainant]. The answer must be yes." This does not constitute the application of the appropriate standard of proof. In relation to the first and second set of charges the Disciplinary Committee said that it found "substantial evidence" that the complainant behaved in ways that were incompatible with her duties as a staff member. The difficulty with this test is that it allows for the possibility that there was other evidence pointing in the opposite direction. It is undesirable to seek to explain or elaborate upon what, in general, might constitute proof beyond reasonable doubt, but in this case, were there such other evidence, it probably would be difficult to be satisfied to that standard of proof. In any event, it does not, again, constitute the application of the appropriate standard of proof.

11. In relation to the third set of charges the Disciplinary Committee said: "There is no room for doubt regarding the charges. In her concluding remarks during the Hearing, [the complainant] admitted the charges and indeed reserved the right to continue along these lines." It might be thought that this did involve the application of the appropriate standard though not expressed as it normally is. Even if it was, however, the conclusion of the Disciplinary Committee that the appropriate sanction was dismissal was based on its assessment of all

three sets of charges and, it seems, on its finding that the conduct constituting those charges had been proved to the appropriate standard. As already discussed, its assessment of the evidence was not the result of the application of that standard and, accordingly, its determination of the appropriate sanction was tainted by that error.

12. The approach of the President in the original decision of 15 January 2016 to dismiss the complainant was slightly different. In relation to what was described as the first charge, the President referred to the Disciplinary Committee's conclusion that there had been "substantial evidence" that the complainant had behaved in particular ways. Thus the President repeated the error of the Disciplinary Committee by not applying the appropriate standard of proof. In relation to what was described as the second charge, the President said that the "evidence brought before the Committee showed beyond any doubt" that the complainant had used totally inappropriate language at a particular meeting. Again this might be thought to have involved the application of the appropriate standard of proof. However in relation to the question of whether the evidence disclosed that she had repeated the same language at a later meeting, no reference is made to the appropriate standard or language which might encapsulate that standard. The President made no reference to any standard of evaluation of the evidence in relation to what was described as the third charge.

13. In his decision of 15 January 2016, the President refers to the Office's report under Article 100 of the Service Regulations "that each of [the] charges, individually, without more, fully suffices to justify" dismissal. However, the President does not, himself, express that view. In some circumstances, it may be that if one of a number of sets of charges was assessed applying the appropriate standard of proof and a conclusion of guilt reached, the imposition of a particular disciplinary sanction might be justified by reference to the proof of that set of charges beyond a reasonable doubt notwithstanding the failure to apply the appropriate standard in relation to the other sets of charges. But that is not the position in this matter.

14. In the President's impugned decision of 21 March 2016, no reference is made to the application of the appropriate standard of proof. In all the circumstances, it cannot be assumed that it was applied. In the result, the impugned decision to dismiss the complainant should be set aside because in assessing the complainant's guilt it is not demonstrated that the appropriate standard of proof was applied, namely proof beyond reasonable doubt. The matter should be remitted to the EPO to enable a Disciplinary Committee, differently constituted, to consider the matter under Article 102 of the Service Regulations and for the President to make a fresh decision.

15. No order for reinstatement should be made because if the charges are proved beyond reasonable doubt, a new decision may be made to dismiss the complainant. Depending on what findings are made about the complainant's conduct by applying the appropriate standard of proof, dismissal might remain a proportionate response, and if it is, no issue of material damages would arise. Indeed, and in any event, the complainant's legal representative has advised the Tribunal, since her pleas were finalized, that her request for reinstatement is moot because she has sought to be paid a retirement pension from 1 July 2018 and EPO has agreed. The complainant is entitled to moral damages which the Tribunal assesses in the sum of 20,000 euros. She is also entitled to costs which the Tribunal assesses in the sum of 7,000 euros.

16. It is unnecessary to consider the complainant's first, second and third legal arguments summarised in consideration 4 above as the charges will be considered afresh by a differently constituted Disciplinary Committee. While the fifth and sixth legal arguments may not be entirely moot, it is unnecessary to address them at this stage given that the allegations of misconduct may come to be considered by the President elect who did not occupy that office at the time the impugned decision was made.

17. The complainant sought an oral hearing. The Tribunal is satisfied the complaint can be resolved fairly and reasonably on the written material provided by the parties.

DECISION

For the above reasons,

1. The impugned decision of 21 March 2016 is set aside.
2. The matter is remitted to the EPO to enable the charges against the complainant to be considered afresh by a differently constituted Disciplinary Committee and the President of the Office to make a new decision.
3. The EPO shall pay the complainant moral damages in the sum of 20,000 euros.
4. The EPO shall pay the complainant costs in the sum of 7,000 euros.

In witness of this judgment, adopted on 7 May 2018, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Mr Yves Kreins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 26 June 2018.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

YVES KREINS

DRAŽEN PETROVIĆ