

C. (No. 3)

v.

EPO

125th Session

Judgment No. 3958

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr P. C. against the European Patent Organisation (EPO) on 8 July 2015 and corrected on 7 October 2015, the EPO's reply of 16 February 2016, the complainant's rejoinder of 6 June 2016 and the EPO's surrejoinder of 16 January 2017;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

The complainant, a member of an EPO Board of Appeal, contests decision CA/D 12/14, in which the Administrative Council decided to impose upon him several measures in relation to an alleged misconduct, including to suspend him, to subject him to a "house ban", to request him to relinquish all EPO property in his possession, and to block his EPO User ID.

On 3 December 2014, while using a computer located in a room in the publicly accessible area of the EPO headquarters building, the complainant was approached by members of the Investigative Unit and was handed two letters, the first informing him that he was under investigation for alleged misconduct, and the second that he was subject to a house ban blocking his access to EPO premises, documents and

resources, and that his User ID would also be blocked. The members of the Investigative Unit confiscated the USB memory stick that the complainant had inserted into the computer he was using. Then they escorted him first to his office and subsequently outside the EPO building. That same day the President of the European Patent Office issued on the Intranet “Communiqué No. 64” entitled “Anonymous defamation: EPO staff member apparently involved”.

On 11 December 2014 the Administrative Council adopted decision CA/D 12/14 on the basis of the President’s proposal contained in document CA/C 8/14. Having regard to the complainant’s alleged misconduct (disclosure of non-public elements of at least one Board of Appeal case to third parties, dissemination of defamatory and/or threatening messages and/or material, storage in the workplace of devices qualifying as weapons), the Administrative Council decided to suspend the complainant on full pay with immediate effect until 31 March 2015, to maintain the house ban and the blocking of his User ID, to request him to hand over any EPO property in his possession and to designate the Investigative Unit as the competent body to carry out the relevant investigation.

On 22 January 2015 the complainant filed a request for review of decision CA/D 12/14 asking the Administrative Council, among other things, to set aside said decision in its entirety, to lift his suspension, to rescind the house ban imposed upon him, to immediately terminate the investigation against him or, otherwise, transfer the responsibility for any further investigation to an independent and impartial body, or to the jurisdiction of the host State. He also asked the Administrative Council to afford him the right to be heard, to exclude the President from any hearing and to ensure that a copy of document CA/C 8/14 be provided to him. He claimed compensation and/or moral damages and costs.

At its 143rd meeting held on 25 and 26 March 2015, the Administrative Council, based on the President’s opinion contained in document CA/C 6/15 and submitted to the Administrative Council under Article 18(1) of its Rules of Procedure, decided to reject the complainant’s request for review as partially irreceivable and, to the extent it was deemed receivable, as unfounded. The Administrative

Council also decided to initiate disciplinary proceedings against the complainant and to maintain his suspension until the end of such proceedings. These decisions were recorded in document CA/28/15. By a letter of 26 March 2015, the complainant was notified of the decision regarding the initiation of disciplinary proceedings and the maintaining of his suspension pending their completion. By another letter dated 10 April 2015, he was informed that for the reasons given in the President's opinion contained in document CA/C 6/15, the Administrative Council had decided to reject his 22 January 2015 request for review. That is the impugned decision in the present proceedings in relation to the complainant's third complaint filed with the Tribunal.

The complainant requests that the impugned decision be set aside, that the decision to suspend him (CA/D 12/14) likewise be set aside with full retroactive effect, and that he be reinstated in his former post without restriction. He asks the Tribunal: (i) to review the lawfulness of Circular No. 342 and to declare it inapplicable to senior employees appointed under Article 11(3) of the European Patent Convention and/or to investigative procedures conducted under the authority of the Administrative Council; (ii) to declare that the Investigative Unit was not the competent body to pursue an investigation against him due to its complete subordination to the President of the Office and its lack of organisational independence; (iii) to review the lawfulness of the covert surveillance measures employed by the Investigative Unit having regard to Article 11 of the Data Protection Guidelines; (iv) to review the lawfulness of the Data Protection Guidelines provisions which allow derogations for "internal investigative processes" under Circular No. 342, in particular Article 12 thereof; (v) to order that an independent, external investigation be carried out into the allegations of misconduct against him and that the investigators report directly to the Administrative Council. The complainant claims compensation and/or moral damages in the amount of 100,000 euros, substantial exemplary damages to be determined by the Tribunal, costs, and such other relief as the Tribunal deems just, necessary and appropriate. He seeks interest at the rate of 5 per cent per annum from the date of his suspension until all amounts awarded by the Tribunal are fully paid.

The EPO asks the Tribunal to dismiss the complaint as irreceivable in part for lack of a final decision within the EPO and for lack of a cause of action. The EPO further asks the Tribunal to dismiss the complaint as unfounded in the remainder.

CONSIDERATIONS

1. On 9 December 2014 the President of the Office proposed, in document CA/C 8/14, that the Administrative Council, in accordance with Article 11 of the European Patent Convention and Article 95 of the Service Regulations for permanent employees of the European Patent Office, suspend the complainant, who was appointed by the Administrative Council, with immediate effect pending further investigation and proceedings regarding allegations of serious misconduct. Specifically, the President stated that the *prima facie* facts relating to the allegations of serious misconduct included, but were not limited to, the following: “the disclosure of non-public elements of at least one Board of Appeal case to third parties; active involvement in the dissemination of multiple anonymous mailings of a threatening and/or defamatory nature; administration of numerous web mail accounts which have been used to circulate defamatory and abusive material over the past months; storage in the workplace of devices qualifying as weapons under national law”. The President also stated that the initiation of disciplinary proceedings should be envisaged if the initial findings of the investigation were confirmed.

2. Based on the President’s proposal, the Administrative Council decided on 11 December 2014 to suspend the complainant with immediate effect until 31 March 2015 with full pay (decision CA/D 12/14). In that decision the Council stated inter alia: “[i]n view of the seriousness of the alleged misconduct (disclosure of non-public elements of at least one Board of Appeal case to third parties, dissemination of defamatory and/or threatening messages and/or material, storage in the workplace of devices qualifying as weapons) which, by its very nature, is incompatible with continued EPO service

as member of a Technical Board of Appeal or otherwise: (1) [...] [the interim measure of] suspension is the most appropriate and necessary means for the sake of the integrity of internal information, to safeguard the complex investigation process, and to avoid any destruction of evidence and possible recurrence of behaviour as well as in view of the existing security risk”. In addition to suspending the complainant, the Administrative Council decided that:

“(3) [The complainant] is not permitted to come to work or to enter any EPO premises, in Munich or elsewhere, unless a specific authorisation has been granted to that effect. A reasoned request for such authorization must be made to the Chairman of the Enlarged Board of Appeal. (4) [The complainant] is requested to immediately hand over, if not already done, any EPO property he may be in possession of to the Chairman of the Enlarged Board of Appeal. His User ID will remain blocked. [...] (6) In full respect of the Office regulations concerning investigation, the Office investigative unit is 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 the findings of this investigation, the Administrative Council will decide on the appropriate next steps.”

3. The complainant requested a review of decision CA/D 12/14 in a letter dated 22 January 2015. In that letter, he asked the Administrative Council to hold oral hearings; to exclude the President from the review process as “he d[id] not appear to be a neutral and disinterested party, and ha[d] already made a number of apparently prejudicial statements concerning a pending investigative process”; to lift the suspension imposed by decision CA/D 12/14; to rescind the house ban imposed by the President, to declare it *ultra vires*, and to reprimand the President; to investigate whether covert surveillance measures were being employed against the complainant or other staff members appointed by the Administrative Council without the Council or the Board of Appeal being informed, and to clarify if such measures were based on Circular No. 342; to declare said Circular *ultra vires* and inapplicable to members of the Board of Appeal or, alternatively, to suspend it until an independent legal review of its provisions has been carried out; to investigate and clarify whether the Data Protection Guidelines were in conformity with European Union data protection standards; to order that the investigative process be terminated immediately for breaches

of due process and *ultra vires* acts or, alternatively, to reconsider the finding that the Investigative Unit was competent to carry out the investigation; and to consider transferring the matter to the jurisdiction of the national justice system of the host State. The complainant also asked to be provided with a copy of document CA/C 8/14 (the President's proposal on which decision CA/D 12/14 was based), and claimed moral damages and costs.

4. On 6 March 2015 the President recommended, in document CA/C 6/15, that the Administrative Council reject the complainant's request for review as partially irreceivable and, to the extent receivable, as unfounded. The President considered the request for review to be receivable only insofar as it concerned the claims challenging the decision to suspend the complainant, to receive a copy of document CA/C 8/14, and to be awarded moral damages and costs. He considered the claim to rescind the house ban to be outside the competence of the Administrative Council, as the only competent authority in that regard was the President himself who had taken the decision. He recommended rejecting the complainant's request for oral hearings, as no such hearings were foreseen in the provisions of Article 109 of the Service Regulations ("Review procedure"), Article 3 of the Implementing Rules to Articles 106 to 113 of the Service Regulations, or Article 18 of the Council's Rules of Procedure. The President also noted, with regard to the complainant's request that he not be involved in the review procedure due to an alleged bias against the complainant, that Article 18(1) of the Council's Rules of Procedure authorised him to prepare an opinion on the request for review for the Administrative Council, and that the complainant's allegations of bias did not justify derogating from that rule. The President was of the view that all other claims were irreceivable.

5. With regard to the receivable claims, the President noted that the suspension was legally founded and justified by the needs of the Organisation, and that it abided by the principle of proportionality. He further noted that the suspension was not a disciplinary measure but rather an interim and temporary measure, which could be decided

independently from the initiation of disciplinary proceedings and prior to carrying out any fact-finding exercise and, as such, could be decided without having heard the complainant beforehand, as confirmed by the Tribunal's case law (see Judgment 3138, under 10(a)). The President stated that the request for a copy of CA/C 8/14 was unjustified at that time as that document was an internal confidential document, which there was no need to communicate to the complainant, and the reasons for the contested decision were clearly identified in decision CA/D 12/14.

6. At its 143rd meeting on 25 and 26 March 2015, for the reasons provided in the President's opinion contained in document CA/C 6/15, the Administrative Council unanimously decided to reject the complainant's 22 January 2015 request for review of decision CA/D 12/14 as partially irreceivable and, to the extent receivable, as unfounded (decision documented in CA/28/15). At that same meeting, the Council also decided to initiate disciplinary proceedings against the complainant and to maintain his suspension until the completion of the disciplinary proceedings (this decision was also documented in CA/28/15). The latter two decisions were communicated to the complainant by a letter of 26 March 2015. In another letter from the Chairman of the Administrative Council, dated 10 April 2015, the complainant was notified of the Council's decision to reject his request for review of decision CA/D 12/14. The complainant impugns that decision in the present complaint, his third before the Tribunal.

7. The complainant submits the following grounds for review:

- The President's recommendation to the Administrative Council to reject the complainant's request for review (CA/C 6/15) was based on a manifestly flawed opinion, which was tainted with bias and which breached the principle of due process. The President had a personal interest in the matter, and thus should have recused himself before rendering such opinion on account of a real or apparent conflict of interest.

- The Administrative Council's decision CA/D 12/14 was defective, as it was based on a flawed recommendation, breached the law, and violated the complainant's judicial independence as a Board of Appeal member.
- The decision to apply Circular No. 342 to the complainant, a member of the Board of Appeal, was taken *ultra vires*.
- The Investigative Unit lacked independence because it fell under the supervisory authority of the President.
- The investigative procedure was flawed, as it relied on unlawful covert surveillance measure and breached the EPO's Data Protection Guidelines.
- Article 12(1) of the Data Protection Guidelines was unlawfully applied, resulting in the Investigative Unit being given unfettered investigatory powers with no oversight.
- The investigative procedure violated the complainant's right to due process while articles appearing in the press, together with the President's prejudicial public statements, undermined the presumption of innocence.
- Meetings that the President and the Principle Director of Internal Audit and Oversight held with members of the Enlarged Board of Appeal improperly influenced the Board members.
- In the case that Circular No. 342 is considered lawful, the provisions of that Circular were breached when the complainant's privately-owned USB key was confiscated and not given back.
- The Investigative Unit's action to secure access to the data stored on his USB key, on the basis of the assertion that the device was EPO property, constituted unlawful data theft in violation of Communiqué No. 10. Moreover, the medical examination the complainant underwent with the EPO Medical Advisor was "bogus".

8. The complainant asks the Tribunal to order oral hearings. By way of relief, he asks the Tribunal to set aside the impugned decision; to also set aside the decision to suspend him, decision CA/D 12/14, with full retroactive effect; to reinstate him in his former post without restriction; to declare the President's house ban *ultra vires*; to review

the lawfulness of Circular No. 342 and declare that it cannot be applied to senior employees appointed by the Administrative Council under Article 11(3) of the European Patent Convention; to declare that the Investigative Unit was not the competent body to pursue an investigation against him; to review the lawfulness of the covert surveillance measures employed by the Investigative Unit having regard to Article 11 of the Data Protection Guidelines; to review the lawfulness of the Data Protection Guidelines provisions which allow derogations for “internal investigative processes” under Circular No. 342, in particular of Article 12 thereof; to order an independent, external investigation into the allegations of misconduct against him and that the investigators report directly to the Administrative Council; to award him 100,000 euros in compensation and/or moral damages, substantial exemplary damages, costs, interest at the rate of 5 per cent per annum from the date of his suspension until full payment of all amounts awarded by the Tribunal, and such other relief as the Tribunal deems just, necessary and appropriate.

9. As the written submissions are sufficient to reach a reasoned decision on the complaint, the request for oral proceedings is denied.

10. The question of the President’s alleged conflict of interest, which was raised by the complainant in the request for review and before the Tribunal, represents a threshold substantive issue in this case.

11. According to the Tribunal’s case law, “[i]t is a general rule of law that a person called upon to take a decision affecting the rights or duties of other persons subject to his jurisdiction must withdraw in cases in which his impartiality may be open to question on reasonable grounds. It is immaterial that, subjectively, he may consider himself able to take an unprejudiced decision; nor is it enough for the persons affected by the decision to suspect its author of prejudice. Persons taking part in an advisory capacity in the proceedings of decision-making bodies are equally subject to the above-mentioned rule. It applies also to members of bodies required to make recommendations to decision-making bodies. Although they do not themselves make

decisions, both these types of bodies may sometimes exert a crucial influence on the decision to be taken.” (Judgment 179, under 1; see also Judgments 2225, under 19, 2671, under 10, 2892, under 11, and 3732, under 3.) A conflict of interest occurs in situations where a reasonable person would not exclude partiality, that is, a situation that gives rise to an objective partiality. Even the mere appearance of partiality, based on facts or situations, gives rise to a conflict of interest.

12. In document CA/C 8/14 of 9 December 2014, which formed the basis for the Administrative Council’s decision of suspension (CA/D 12/14), the President stated inter alia that “[i]n March 2013, an investigation was started following the anonymous dissemination of defamatory material concerning the Vice President [of Directorate General 4]. Since then, also the Administrative Council Chair, the President, other senior EPO Staff members, and the Organisation as a whole have been targeted.” In the letter of the Head of the Investigative Unit, dated 3 December 2014 and handed to the complainant that same day, it was alleged that the complainant may have committed misconduct by threatening and insulting the President. In its submissions to the Tribunal, the EPO does not dispute that the President was a victim of the defamatory statements and indicates that the Disciplinary Committee considered that there was evidence showing that the complainant, using a pseudonym, had suggested that the President’s hosting of delegates was an attempt to buy votes and that the complainant had also sent a letter to the Deputy Mayor of Saint-Germain-en-Laye, where the President was a Town Councillor, accusing the President of an abuse of power at the EPO. In his 6 March 2015 opinion to the Council on the complainant’s request for review (CA/C 6/15), the President took the issue of his alleged bias against the complainant into consideration and, as noted in consideration 4 above, he stated that “[p]ursuant to 18(1) of the Council’s rules of procedure, it is up to the President to prepare an opinion on the request for review for the Council. The allegations of bias against the President do not justify derogating from these rules in the present case: in view of the exceptional situation with which the EPO was faced, the President had to communicate both internally

and externally. In doing so, he did not cross the boundaries of confidentiality and presumption of innocence.”

13. In the present case, there is a conflict of interest on the part of the President. It stems from the fact that the alleged serious misconduct, with which the complainant was charged, might reasonably be thought to have offended the President specifically, directly and individually. This situation, by itself, casts doubts on the President’s impartiality. Considering the whole situation, a reasonable person would think that the President would not bring a detached, impartial mind to the issues involved. The argument raised by the President in his opinion to the Council (CA/C 6/15), quoted above, namely that pursuant to the applicable rules the President was acting within his competence and had the power and duty to take all necessary steps to ensure the smooth functioning of the Office, is immaterial. The question of a conflict of interest only arises if the official is competent. Accordingly, the question of competency is not an answer to a charge of a conflict of interest. Hence, the Administrative Council erred in not finding that the President had a conflict of interest in the matter. In this situation, in accordance with the provisions in force, the Administrative Council should have sent the matter back to the next most senior official to exercise authority instead of the President, who was precluded from exercising authority because of his conflict of interest (see Judgement 2892, under 11).

14. As a result, the impugned decision rejecting the complainant’s 22 January 2015 request for review must be set aside, and so must be decision CA/D 12/14 insofar as it concerned the complainant’s original suspension, the confirmation of the house ban, the relinquishment of all EPO property in the complainant’s possession, and the blocking of his User ID (i.e. points 1, 3 and 4 of decision CA/D 12/14). Similarly, the Administrative Council decision taken at its 143rd meeting and documented in CA/28/15 to maintain the complainant’s suspension until the end of the disciplinary proceedings must also be set aside. Regarding the house ban, the Tribunal notes that in his opinion to the Administrative Council on the complainant’s request for review

(CA/C 6/15), the President argued that, although the Council had endorsed the President's decision regarding the house ban, the President himself was the only competent authority to be addressed for the claim to rescind that decision. This is not correct. The Administrative Council is the competent ordinary authority to take the protective and interim measures referred to in Article 14 of Circular No. 342, if these measures are taken against employees appointed by the Council under Article 11 of the European Patent Convention. The President, in this field, has competence only on grounds of urgency or in extenuating circumstances, according to the President's general competence referred to in Article 10 of the European Patent Convention, but it is the Administrative Council that has the competence to review decisions taken on those grounds. That is because the protective and interim measures taken during the investigative process are necessarily connected with a possible disciplinary proceeding and the Administrative Council exercises disciplinary authority over senior employees, in accordance with Article 11, paragraph 4, of the European Patent Convention. Moreover, the decision regarding the house ban, as well as the suspension decision, even if they are essentially interim measures to safeguard the investigation, have, by themselves, an immediate, material, legal and adverse effect on the person concerned, and are not subsumed under the final decision taken at the conclusion of any disciplinary proceedings. Consequently, they cannot be considered mere steps to the final decision of the proceeding. As such, the request for review of these decisions was receivable, and the impugned rejection of that request for review (regarding the suspension as well as the decision regarding the house ban), and the subsequent Administrative Council's endorsement of them must be set aside for the flaw stemming from the President's existing conflict of interest. Accordingly, the complainant must be immediately reinstated in his former post with the consequent lifting of the imposed house ban, the unblocking of his User ID, and the return to him of the EPO property that he had been requested to turn in.

15. The complainant's requests regarding Circular No. 342, Article 12 of the Data Protection Guidelines, and the investigative procedure are irreceivable, as they all either fall under proceedings which are still pending and for which there is no final decision, or are general decisions which can only be impugned with the final individual decision taken to implement them. According to the Tribunal's case law, "[o]rdinarily, the process of decision-making involves a series of steps or findings which lead to a final decision. Those steps or findings do not constitute a decision, much less a final decision. They may be attacked as part of a challenge to the final decision but they themselves, cannot be the subject of a complaint to the Tribunal." (See Judgment 2366, under 16, confirmed in Judgments 3433, under 9, and 3512, under 3.) Accordingly, the complainant's claims related to the investigative procedure and the various acts adopted by the Investigative Unit and by its Chief are merely steps in the proceedings that cannot adversely affect the complainant until a final decision has been taken.

16. Moreover, regarding the initiation of the investigative procedure, it is worth pointing out that the alleged conflict of interest and lack of independence of the Investigative Unit are immaterial. The initial investigation was not directed against identified persons and that, by itself, rules out the possibility of a conflict of interest. As regards the alleged lack of independence, the complainant has not produced any evidence to support this allegation.

17. The unlawful nature of the impugned decision, which confirmed the complainant's suspension, the imposed house ban, the relinquishment of all EPO property previously at his disposal, and the blocking of his User ID, caused the complainant moral injury necessitating an award, which the Tribunal sets at 10,000 euros. As the complainant succeeds in part, he is entitled to costs, which the Tribunal sets at 5,000 euros.

DECISION

For the above reasons,

1. The Administrative Council's decision CA/D 12/14 of 11 December 2014 is set aside and so is the impugned decision of 10 April 2015, insofar as they concern the complainant's suspension, the imposed house ban, the relinquishment of EPO property previously at the complainant's disposal, and the blocking of his User ID.
2. The Administrative Council's decision to maintain the complainant's suspension pending completion of the disciplinary proceedings against him (decision taken at the Administrative Council's 143rd meeting and communicated to the complainant by a letter of 26 March 2015) is also set aside.
3. The complainant shall be immediately reinstated in his former post.
4. The EPO shall immediately allow the complainant access to the EPO premises and resources; it shall return to him any EPO property it requested him to hand over pursuant to decision CA/D 12/14, and it shall immediately unblock his User ID.
5. The EPO shall pay the complainant 10,000 euros in compensation for moral injury.
6. It shall also pay him costs in the amount of 5,000 euros.
7. All other claims are dismissed.

In witness of this judgment, adopted on 26 October 2017, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 December 2017.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

MICHAEL F. MOORE

DRAŽEN PETROVIĆ