

V. (No. 4)

v.

EPO

140th Session

Judgment No. 5074

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Ms M. V. against the European Patent Organisation (EPO) on 21 May 2020, the EPO's reply of 29 September 2020, the complainant's rejoinder of 10 February 2021 and the EPO's surrejoinder of 14 April 2021;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

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

The complainant challenges the decision not to grant her diplomatic privileges and immunities following the introduction of a new career system and the transposition of her grade into that system.

The complainant is a permanent employee of the European Patent Office, the EPO's secretariat, assigned to its Branch in The Hague, the Netherlands. She was promoted to grade A4, step 7, on 1 January 2014.

The Agreement between the EPO and the Kingdom of the Netherlands concerning the Branch of the European Patent Office at The Hague, including the Separate Agreement ("Seat Agreement"), entered into force on 27 June 2006. Article 10(1) of the Seat Agreement conferred diplomatic privileges and immunities, otherwise referred to as "AO" status, to EPO employees exercising their functions in

the Netherlands who had (a) “professional grade of A5 and above” (sub-paragraph (a) of Article 10(1)), or (b) professional grade of A4, provided they had been in that grade for more than two years and had had a basic salary not lower than A5, step 1, from the first of January following the year in which both requirements were fulfilled (sub-paragraph (b) of Article 10(1)).

By decision CA/D 10/14 of 11 December 2014, the Administrative Council introduced, effective 1 January 2015, a new career system. Article 56(1) of decision CA/D 10/14 provided that the grade and step of each employee under the new career system would be determined on the basis of her/his basic salary on 31 December 2014; Article 56(5) of the decision provided that the transposition of each employee into the new career system would become effective on 1 July 2015; Article 62 of the decision provided that the President of the Office would take appropriate measures to ensure a smooth transition to the new career system.

On 2 April 2015, the Local Staff Committee at The Hague transmitted to the Office a study about the possible effects of the new career system on the grant of AO status to office employees qualifying for that status under sub-paragraph (b) of Article 10(1) of the Seat Agreement.

Having taken note of Administrative Council decision CA/D 10/14, on 5 February 2016, the Dutch Ministry of Foreign Affairs delivered a *Note Verbale* to the EPO, in which it provided an interpretative declaration on Article 10(1) of the Seat Agreement. This interpretative declaration provided in relevant part that the Kingdom of the Netherlands “interpret[ed] the term ‘professional grade of A5 and above’ to refer to ‘job group 3 (G13/3) and above’ [in the new career system] and that it interpret[ed] the term ‘professional grade of A4, provided they have been in that grade for more than two years and have had a basic salary not lower than A5 step 1’ to refer to ‘job group 4 and having at least a basic salary corresponding to the lowest possible basic salary of an employee in the job group 3 (G13/3)’ [in the new career system]”.

By a decision of 10 February 2016, the President of the Office officially adopted the interpretation provided by the Dutch Ministry of Foreign Affairs. The decision also provided that employees to whom Article 10(1) of the Seat Agreement did not apply on 1 January 2015 or before, but who had a basic salary not lower than A5, step 1, on 1 January 2015, and were assigned to grade A4 before or on 1 July 2013 would be entitled to AO status and corresponding privileges and immunities as from 1 January 2016. By an announcement issued on 11 March 2016, the Administration informed employees of the interpretative declaration of Article 10(1) of the Seat Agreement provided by the Dutch Ministry of Foreign Affairs and of the President's 10 February 2016 decision.

The Office provided the Dutch Ministry of Foreign Affairs with a list of the names of officials it considered eligible for AO status and corresponding privileges and immunities for the period from 1 January 2016 onwards. The complainant's name was not included in that list. On 30 March 2016, the complainant submitted a request for review of the Office's decision not to put forward her name to the Dutch Ministry of Foreign Affairs for the granting of AO status as from 1 January 2016. Having received no decision on her request for review, she filed an appeal with the Appeals Committee on 9 August 2016.

The complainant's appeal was examined together with other similar appeals by the Appeals Committee which delivered its opinion on 18 December 2019. The Appeals Committee considered the appeal receivable only insofar as the complainant claimed that the Office had violated its duty of care towards her by not putting forward her name to the Dutch Ministry of Foreign Affairs for the granting of AO status. On the merits, a majority of the Appeals Committee found the appeal to be unfounded and recommended that it be rejected. Two members of the Committee expressed a dissenting opinion, recommending that the President renegotiate changed terms of the Seat Agreement and that the complainant be awarded not less than 2,500 euros in moral damages for the Office's violation of its duty of care. The Appeals Committee unanimously recommended that the complainant be awarded 200 euros in moral damages for the Office's violation of its duty of care by reason

of the long period during which staff were left in a state of uncertainty as to who would qualify for AO status, and another 150 euros in moral damages for the undue length of the appeal proceedings.

By a letter of 21 February 2020, attaching a copy of the Appeals Committee's opinion, the Vice-President of Directorate-General 4 decided, by delegation of authority from the President, to follow the Appeals Committee's majority recommendation to reject the appeal as unfounded, insofar as receivable, and to award the complainant 350 euros in moral damages. This is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to grant her AO status and to reimburse her for all the taxes which fall within the scope of the conditions for reimbursement established by the Seat Agreement during the period in which she was denied AO status. She claims moral damages for her "callous" treatment by the Office and she also claims the costs incurred by her or her representatives.

The EPO asks the Tribunal to dismiss the complaint as unfounded to the extent receivable, and to reject the complainant's ancillary claims.

CONSIDERATIONS

1. The complainant impugns the 21 February 2020 decision by which the Vice-President of Directorate-General 4, by delegation of power from the President of the Office, dismissed her appeal against the decision not to put forward her name to the host State (the Kingdom of the Netherlands) for the purpose of the diplomatic privileges and immunities provided for in Article 10 of the Seat Agreement between the latter and the EPO.

She contends, in brief, that:

- under Article 10 of the Seat Agreement, she was eligible for diplomatic privileges and immunities as from 1 January 2016;

- the interpretation of Article 10 of the Seat Agreement adopted by the EPO in 2016, following the entry into force of the new career system was, in reality, an unlawful amendment to the Agreement;
- in any event, by adopting such interpretation, the EPO breached its duty of care towards her; and
- she was negatively affected by her transposition into grade G13, step 1, in the new career system which disqualified her from the entitlement under the said Article 10.

2. It is appropriate at the outset to note that Article 10 of the Seat Agreement between the Kingdom of the Netherlands (the host State) and the EPO established:

“Privileges and immunities of the employees of the Office

1. Employees of the Office exercising their functions in the Netherlands,

a. having the professional grade of A5 and above, or

b. having the professional grade of A4, provided they have been in that grade for more than two years and have had a basic salary not lower than A5 step 1, from the first of January following the year in which both requirements were fulfilled shall enjoy the same privileges and immunities as the Netherlands accords to diplomatic agents of the diplomatic missions established in the Netherlands in accordance with the Vienna Convention [...]

Under Article 10(1)(b), employees at grade A4 qualified for the so-called “AO” status if they met the following cumulative criteria, which embodied a combination of seniority, competence, and remuneration:

- two years at grade A4;
- a salary not lower than that of employees at grade A5, step 1.

According to the EPO, since the salary of employees at grade A5, step 1, was at the relevant time 9,718 euros, only staff who reached at least grade A4, step 7, qualified for AO status, provided that they had been in that grade for more than two years.

After the new career system was introduced as from 2015, grades A5 and A4 were transposed into a single spine grading scale and, as a result, those grades no longer existed. Consequently, the provisions of the Seat Agreement referring to grades A5 and A4 could no longer be applied in their literal meaning.

On 5 February 2016, the Dutch Ministry of Foreign Affairs issued a *Note Verbale* to the EPO containing an interpretation of Article 10 of the Seat Agreement. The President of the Office adopted the Dutch Ministry of Foreign Affairs' interpretation by a decision dated 10 February 2016. Pursuant to that interpretation, the EPO's staff members eligible for diplomatic privileges and immunities, under Article 10 of the Seat Agreement, were permanent employees who either held grade G13, step 3, in the new career system or permanent employees who had a basic salary corresponding to the lowest possible basic salary of an employee at grade G13, step 3. As a transitional measure, the President's 10 February 2016 decision granted AO status, as from 1 January 2016, inter alia, to staff who had been assigned to grade A4 before or on 1 July 2013.

3. The complainant was assigned to grade A4, step 7, as from 1 January 2014.

Administrative Council decision CA/D 10/14, introducing the new career system entered into force on 1 January 2015. The transposition of old grades into the new "single spine" grading system became effective as from 1 July 2015.

The complainant was transposed into grade 12, step 3, of the new career system as from 1 January 2015.

She was assigned to grade 13, step 1, as from 1 January 2016.

In light of the foregoing, it is manifest that the complainant did not meet the requirements and was not eligible for the grant of diplomatic privileges and immunities pursuant to Article 10 of the Seat Agreement, either before or after the entry into force of the new career system.

Before the new career system became effective, as from 1 July 2015, she had held grade A4 for less than two years. Thus, she had not accrued two years of seniority in the grade, and she did not meet the requirement of the transitional measure, which concerned staff holding grade A4 before or on 1 July 2013, as she received that status as from 1 January 2014.

Under the new career system, she held grade 13, step 1, and not the required grade 13, step 3.

4. The complainant's contention that she had "accrued [two] years" of seniority in grade A4(2) on 1 January 2016, is misconceived. Grade A4 no longer existed in January 2016 and, thus, it was no longer possible to accrue seniority in that grade. Arguing that she would have accrued grade A4(2) in January 2016, save for the transposition into the new career system, is mere speculation.

5. The complainant contends that the interpretation of the Seat Agreement agreed upon between the host State and the EPO in 2016 was not a mere interpretation – but rather an amendment – which modified the Seat Agreement in a way detrimental to the EPO's permanent employees. As such, the interpretation should have been negotiated with the consultation of the General Consultative Committee and the approval by the Administrative Council. This contention is beyond the competence of the Tribunal. The Seat Agreement is an international agreement between two entities under international law and, as such, it does not grant any direct rights and benefits to individuals. Thus, it is not part of the terms of appointment of the EPO staff and it is outside the Tribunal's competence pursuant to Article II, paragraph 1, of its Statute. The Tribunal does not have jurisdiction to examine its validity (see Judgment 3105, consideration 5), including the procedure by which it was adopted or amended. It is therefore irrelevant whether the interpretation adopted in 2016 was a mere interpretation or an amendment. What is relevant is that this interpretation was agreed upon between the host State and the EPO, which thereby committed to comply with it. The plea is therefore unfounded.

6. The complainant further contends that the EPO breached its duty of care towards staff by accepting, or proposing, the said interpretation. The Tribunal notes that after the new career system entered into force, Article 10 of the Seat Agreement was no longer literally applicable in the terms in which it was expressed, as grades A5

and A4(2) explicitly mentioned therein no longer existed, and Article 10 did not mention the new grades. A renegotiation of the Seat Agreement would have been necessary, which would have taken time, and its outcome would not have been foreseeable. There is evidence in the record that the host State declared how it would have interpreted Article 10, in light of the new career system, and that the EPO informed staff about this interpretation. Even assuming that the interpretation adopted by the host State was the outcome of a negotiation with the EPO, such negotiation between the EPO and the host State can in no way be regarded as an infringement of the EPO's duty of care towards its staff.

7. The complainant contends that what was detrimental to her was not the new interpretation of Article 10 of the Seat Agreement, but the new career system and the way she was transposed into it. However, the complainant has not demonstrated that the new career system has been successfully challenged. Moreover, she has not established that her transposition into the new career system at grade 12, step 3, rather than at grade 13, step 3, which would have qualified her for diplomatic privileges and immunities, was legally flawed. Accordingly, the alleged detriment cannot be considered the consequence of an unlawful decision.

8. She further alleges an infringement of her acquired rights and a lack of transitional measures. However, it is evident that she had no acquired rights, as she had not accrued the required seniority for AO status at the time the new career system entered into force. Furthermore, the EPO did adopt transitional measures, which fell within its discretionary power and which were, in the present case, reasonable. What the complainant actually contends is a lack of a transitional measure tailored to her situation, but her contention is untenable, having regard to the discretionary nature of transitional measures.

9. In conclusion, since the complainant's pleas are either irreceivable or unfounded, all her claims are rejected and the complaint will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 5 May 2025, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

RENÉ M. VARGAS M.