R. (No. 2)

v.

EPO

132nd Session **Judgment No. 4427**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr M. R. against the European Patent Organisation (EPO) on 25 October 2013 and corrected on 18 November 2013, the EPO's reply of 17 March 2014 and the email of 30 May 2014 by which the complainant's counsel informed the Registrar of the Tribunal that the complainant did not wish to file a rejoinder;

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 maintain his transfer to a patent examiner post.

Facts relevant to this case are to be found in Judgment 3161, delivered in public on 6 February 2013, concerning the first complaint filed by the complainant. Suffice it to recall that in December 2007 the complainant, who was then working as an administrator in the Directorate of European Affairs, Member States within the Principal Directorate European and International Affairs (PD5.1), in the European Patent Office, the EPO's secretariat, was informed that the Office was considering transferring him back to an examiner post on the grounds that his professional skills were predominantly technical and did not correspond to those needed in that Directorate. In February 2008 the complainant replied that he had no wish to be transferred to an examiner post, which,

in his view, would be contrary to the interests of the Office and to his own interests, but that he would be willing to move to a post that was commensurate with his knowledge and experience. Thereafter, the complainant's counsel wrote to the Principal Director of Human Resources reiterating the complainant's wishes and seeking confirmation that the latter would not be transferred to an examiner post.

In a letter of 16 July to the President of the Office, the complainant's counsel requested that the complainant should not be transferred to an examiner post, and that he continue to be employed in the same Directorate. In September 2008 the matter was referred to the Internal Appeals Committee (IAC) for an opinion.

By a letter of 10 October 2008, the complainant was notified of the decision to transfer him, with effect from 1 November 2008, to the post of examiner in Directorate 2.2.13. It was specified in the letter that his grade and step would remain unchanged and that he would receive training for the first three years. In October 2008 the complainant's counsel informed the IAC that the internal appeal should be considered as being also directed against the decision of 10 October 2008.

After a hearing that took place in December 2008, the IAC issued its opinion on 8 June 2009. A majority of its members recommended, in particular, that the complainant's transfer be set aside and that he be redeployed, preferably within PD5.1, to a post commensurate with his experience. According to the majority, the reasons given to justify the transfer, having taken due account of mutual interests, were insufficient. A minority of the IAC's members recommended rejecting the appeal on the basis that the interests of the Office were clearly more relevant and should prevail.

By a letter of 9 December 2009 the complainant was informed that the President had decided to follow the minority opinion and to dismiss the internal appeal as unfounded. In particular, he disagreed with the finding that the reasons given for the complainant's transfer were not sufficient and found that the IAC's majority opinion had exceeded the limits of the legal review applicable to discretionary decisions such as transfers.

In Judgment 3161, the Tribunal set aside the decision of the President contained in the letter of 9 December 2009 on the basis that it was not fully and adequately motivated. The Tribunal remitted the case

to the Organisation to give proper consideration to the recommendations of the IAC.

By a letter of 11 July 2013, which is the impugned decision in the present proceedings, the Vice-President of Directorate-General 4 (DG4), by delegation of power from the President, provided additional clarifications on the decision to reject the complainant's claims and confirmed the dismissal of his internal appeal.

The complainant asks the Tribunal to set aside the decision of 11 July 2013. He seeks reinstatement in his previous post or, in the alternative, to be placed in another administrative post within PD5.1 which corresponds to his qualifications, experience and skills. If such a post is not immediately available, he asks to be placed "on loan" to PD5.1 and to be assigned to a suitable vacant post within a reasonable period of time. He also seeks moral damages of 60,000 Swiss francs as well as costs.

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

CONSIDERATIONS

1. The complainant signifies in the complaint form that he wants a hearing under Article 12, paragraph 1, of the Tribunal's Rules. The request is rejected as the Tribunal is sufficiently informed of all aspects of the case to consider it fully on the material which the parties provide.

2. The complainant initiated the proceedings underlying this complaint by contesting the decision to transfer him from an administrative position to the post of examiner at the same grade with effect from 1 November 2008. Article 12(2) of the Service Regulations, in the version in force at the material time, states that a permanent employee may be transferred within the Office either on the initiative of the appointing authority, the President, or at his own request to a vacant post which corresponds to his grade. Additionally, consistent precedent has it that an executive head of an international organization has wide discretionary powers to manage the affairs of the organization pursuant to the policy directives and its rules and that such decisions are consequently subject to only limited review. The Tribunal will ascertain whether a transfer decision is taken in accordance with the relevant rules on competence, form or procedure; rests upon a mistake of fact or

law or whether it amounts to abuse of authority. The Tribunal will not rule on the appropriateness of the decision as it will not substitute the organization's view with its own (see, for example, Judgment 4084, under 8).

3. In Judgment 3161 the Tribunal set aside the impugned decision, dated 9 December 2009, on the basis that it was not fully and adequately motivated as is required when such a decision refuses, to a staff member's detriment, to follow a favourable recommendation by an internal appeal body. It remitted the case to the EPO to consider the recommendations of the Internal Appeals Committee (IAC) in accordance with consideration 7 of the said Judgment 3161.

4. The rationale for fully and adequately motivating the final decision on an internal appeal was relevantly stated as follows, in consideration 9 of Judgment 3727:

> "It is not sufficient to explain why, in the opinion of the executive head of the organisation, the internal appeal body approached an issue in a way that was flawed. It is also necessary to explain the basis on which the conclusion actually reached by the executive head of the organisation was arrived at if it was different to the conclusion of the internal appeal body [...] In the present case, it was necessary for the Secretary General not simply to identify perceived flaws in the reasoning or procedures of the Commission said to undermine its conclusion that the post had evolved but, in addition, to explain his reasons for the conclusion that the post had been "cut". This leads to consideration of whether, in all the circumstances, the impugned decision sufficiently explained this latter conclusion."

5. In consideration 7 of Judgment 3161, the Tribunal explained what was required, in the final decision on an internal appeal, in order to fully and adequately explain the reasons for not accepting the recommendation made by the majority of the IAC to set aside the decision to transfer the complainant to the post of examiner. The Tribunal reiterated the general principle that the President of the Office is obliged to give proper consideration to the recommendations of the IAC and not avoid addressing the reasoning of its members by wrongly indicating, as in this case, that the majority of the IAC's members had exceeded the limits of their role in determining the appeal. The Tribunal also observed that the President's approach appeared to have had the result that several key features of the analysis of the majority of the members of the IAC were either not referred to by her, the President, or

glossed over in her reasoning. It noted as an example that the impugned decision did not adequately answer to the view of the majority of the IAC that the complainant's transfer could not have been justified because there was then an urgent need for examiners given that the complainant would have required three years' training as an examiner. As a second example, the Tribunal noted that the impugned decision did not adequately answer the complainant's claim, accepted by the majority, that "he went from being an administrator and experienced project manager to being an entry-level examiner, a major change in status".

6. In the present complaint, the complainant contends that the EPO failed to implement Judgment 3161 because in the impugned decision, dated 11 July 2013, the Vice-President of DG4 essentially repeated what was stated in the decision of 9 December 2009 and did not take the complainant's and the majority of the IAC members' arguments into consideration as the Tribunal had directed. He insists that the Vice-President's approach appears to have had the result that several key features of the analysis of the IAC majority were either not referred to by the Vice-President, or glossed over in the reasoning.

7. The main conclusions on the basis of which the IAC majority recommended setting aside the decision to transfer the complainant were expressed as follows. The complainant was told, as one reason for his transfer, that there was an urgent need in DG1 to recruit examiners in order to cope with the increasing workload. The argument that DG1 needed staff is completely unconvincing in the complainant's case because he had not worked as an examiner for 16 years and therefore had not kept abreast of developments in his technical field. Since he worked exclusively as a search examiner for the first three years and four months of his employment with the EPO, he would have had to be retrained from scratch to work in "BEST" examination, which was introduced in the meantime and also encompassed the substantive search on a patent application. He was not likely to be familiar with the electronic, often highly sophisticated search tools for examiners which were developed since the start of the nineteen nineties. On transfer, he was therefore first sent to the Academy. The Office assumed an average learning curve of three years. In addition, the complainant would have had to re-familiarize himself with the latest developments in his field. He also needed technical refresher training to work on patent files.

He could do nothing in the short term to alleviate the urgent need for examiners, so the transfer cannot be justified on that ground. The Office did not say, for example, that it could not meet its staff needs by recruitment on the open market. The Office still loaned examiners to non-examination areas: a further indication that there was no shortage of examiners.

Another reason which the Office gave, namely that the complainant was transferred to DG1 because of its policy of examiner rotation, is clearly inconsistent. The principle of rotation is generally applied to examiners who are temporarily deployed to a new area "on loan". The timeframe for such a deployment is limited from the outset so that the persons concerned do not lose their examining skills and knowledge (which undergo rapid and constant change) and can resume examination work at a later stage. The evidence is that an optimum period in a post is three to five years, which the complainant with his 16 years' service in DG5 had long exceeded. Moreover since his transfer to DG5 in March 1992, he occupied an administrator budget post and was never on loan on his examiner budget post. Accordingly, it cannot be assumed that he can still be regarded as an examiner, which means that he is no longer a candidate for examiner job rotation and that the Office proceeded on the wrong basis. Even if, in principle, rotation is not restricted to employees "on loan" but can also apply to transfers from one permanent budget post to another, due account was not taken of the various relevant interests in this case. A general rotation policy aims to give staff a broader perspective on Office affairs, without losing them forever from the areas of activity to which their original qualifications correspond. It is pointless to pursue this aim in the case of the complainant, who after 16 years was no longer familiar with the state of the art. He had therefore long since lost his examining skills and it is not apparent that examining could represent any form of professional advancement for him. Neither can his transfer to DG1 be justified as being in the legitimate interests of the Office. It could only have been justified if the complainant was agreeable. He consistently resisted the transfer, but said that he was open to the idea of being transferred to another administrator role.

In particular, a majority of the IAC members did not share the Office's view that the transfer did not seriously affect the complainant's interests. While it would not have any direct financial impact on him, he went from being an administrator and experienced project manager to being an entry-level examiner, a major change in status. He is daily

subjected to the stress associated with the transfer he refused. His long-term career prospects have also been affected. Even though more A4(2) and A5 posts can in principle be created in DG1 than in DG5, it is unlikely, given that he has to acquire a basic knowledge of patent examination, that he could be promoted in DG1 in the foreseeable future. For this reason, job rotation, which is to be welcomed in principle, is pointless in his case. As a result of his transfer, the complainant will have no chance in the next five to eight years to reach grade A4(2) in DG1 because he is unlikely to have any opportunity as an examiner to demonstrate the necessary "particular merits" in the foreseeable future. In DG5, by contrast, he was called upon to demonstrate his merits as a project manager and head of the Automation Unit so that, having been at grade A4 since March 2002, he could, depending on his staff reports and future merits, have been considered for such a promotion.

8. In the impugned decision of 11 July 2013, the Vice-President relevantly stated the reasons for not accepting the analyses and conclusions by the majority of the IAC as follows:

> "The IAC majority did not refute the existence of the need for additional examiner manpower but considered that the Office should have resorted to other means of fulfilling this need or refrained from invoking this need in your specific case.
>
> The decision about the means of filling the post remains in the discretion of the appointing authority, therefore the majority's argument that the Office should have resorted rather to external recruitment is not followed. The reasoning is the following: as regards the majority's suggestion to solve the matter by stopping the use of box IV time, it was fully consistent and reasonable for the Office to maintain this means of already time-limited job enrichment to offer career opportunities to other examiners. For the same reason, the job rotation argument was raised in the context of your transfer, to offer rotation possibilities for other examiners.
>
> As regards your specific case, considering that you had been recruited and initially assigned to the post of an examiner, thus clearly have the necessary qualifications and abilities as well as necessary external and internal experience to carry out the relevant duties, it cannot be stated that you were no longer qualified for this post and that the Office was precluded from reassigning you to examining tasks. The Appeals Committee and the Ombudsman did not conclude that the Office would have shown bad faith when taking the transfer decision or offended your dignity. Your transfer was thus a reasonable decision to meet the interests of the service in the context of the changed job environment in DG5 and the need for examiners in DG1.

> As regards the majority's opinion that in view of the training needed, your re-assignment to examining tasks could not be justified, it is noted that the necessary training effort was likely to be in view of your prior experience much lower than for a new-recruit. The majority's view that as a consequence of the transfer you went to being an 'entry level examiner' ignores the fact that the tasks assigned to you were fully commensurate with your grade and qualifications and that you could more rapidly integrate in DG1 and thereby achieve a high degree of independence and responsibility. The majority's conclusion that the Office should have resorted to recruitment instead is thus not correct. It is noted that the governing principle of equivalence of grade and post calls, in the event of a transfer, not for a comparison between the staff member's present and previous duties but for a comparison between his present duties and the grade which he occupies."

9. It is noteworthy, first, that notwithstanding the last statement in the foregoing passage, the Vice-President provided no comparison, in the impugned decision of July 2013, between the complainant's duties in his examiner's post and the complainant's grade. Neither was there an attempt to explain that in transferring the complainant, the EPO showed due regard, in both form and substance, for his dignity, particularly by providing him with work of the same level of responsibilities as he performed in his previous post and matching his qualifications (see, for example, Judgment 4240, consideration 5). In the second place, in the impugned decision of July 2013, the Vice-President did not provide an explanation to counter the IAC's conclusion that the EPO's argument that the complainant was transferred to DG1 because it needed staff was completely unconvincing in the complainant's case. Neither did the Vice-President explain how the rotation policy applied to the complainant given that his transfer was not on loan and without time limit. Moreover, in light of the majority's comparison of the relative interests of the EPO and the complainant in the transfer and its conclusion that the transfer was not in the interest of either party, it was not enough for the Vice-President to disagree merely by accepting the position of the minority of the IAC on the issue. Rather, it was necessary for him to explain why he disagreed with the opinion of the majority.

10. The complainant was entitled to a more complete explanation for his transfer from the administrative position which he held for about 16 years to what was effectively an entry level examiner's position, albeit retaining his grade. Accordingly, the Tribunal concludes that the impugned decision does not meet the requirements established by the

Tribunal's case law. It must therefore be set aside, as also must the initial transfer decision of 10 October 2008.

11. The complainant's contention that the decision to transfer him to the examiner's position violated the EPO's duty of care and his dignity is well founded given the indignity and humiliation he suffered by virtue of his transfer from the administrative post that he held for some 16 years to what was, in effect, an entry level examiner's position. The Tribunal has consistently stated, in Judgment 4240, consideration 16, for example, that an organization must carefully take into account the interests and dignity of staff members when effecting a transfer to which the staff member concerned is opposed. It should have been obvious to the EPO that the complainant's responsibilities in the new post were significantly different from those responsibilities which were attached to his previous post and were not objectively comparable with his previous responsibilities. Moreover, there is no evidence to show that the complainant's legitimate objections to the proposed transfer were properly addressed by the Administration before he was transferred.

12. However, the complainant's contention that the transfer decision was tainted by misuse of authority is unfounded. In consideration 10 of Judgment 4146, for example, the Tribunal recalled that the principle of good faith and the concomitant duty of care require international organisations to treat their staff with due consideration in order to avoid causing them undue injury. It also observed that in order for there to be misuse of authority, it must be established that the decision rested on considerations extraneous to the organisation's interests and that the staff member alleging abuse of authority bears the burden of establishing the improper purpose for which the authority was exercised. Misuse of authority cannot be presumed. The complainant has not provided evidence, against conjecture, that shows that his transfer was based on improper purpose.

13. The complainant's requests to be reinstated in his previous post, or, alternatively, to be transferred to another administrative post in PD5 corresponding to his qualifications or to be placed "on loan" to PD5.1 or be assigned to a suitable vacant post within a reasonable period of time are rejected as those requests have been overtaken by

time. He retired from the service of the EPO with effect from 1 January 2020.

14. Given the unlawfulness of the decision to transfer the complainant to the examiner's post in October 2008 and his evidence of the injury (the humiliation and loss of status) which the transfer decision caused him, he is entitled to moral damages for which he will be awarded 50,000 Swiss francs.

15. Inasmuch as the complainant prevails in this complaint, he will be awarded costs in the amount of 8,000 Swiss francs.

DECISION

For the above reasons,

1. The impugned decision dated 11 July 2013 and the initial decision of 10 October 2008 to transfer the complainant are set aside.
2. The EPO shall pay the complainant 50,000 Swiss francs in moral damages.
3. The EPO shall also pay the complainant costs in the amount of 8,000 Swiss francs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 9 June 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ