

## SEVENTY-SEVENTH SESSION

### *In re* KRUSE

#### Judgment 1343

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Gerhard Kruse against the European Patent Organisation (EPO) on 15 October 1993 and corrected on 4 November 1993, the EPO's reply of 28 January 1994, the complainant's rejoinder of 6 March and the Organisation's surrejoinder of 12 April 1994;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 12 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written submissions and decided not to grant the complainant's application for the hearing of a witness;

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

A. The complainant, a German who was born in 1935, joined the staff of the EPO in 1980 at grade A2/A3 as head of the Library and Public Information Department in Directorate-General 4 (DG4) in Munich. In 1986 he got promotion to grade A4. On 1 January 1990 the Department was transferred from DG4 to a new Principal Directorate for Patent Information (PD 0.4).

In July 1991 the Consultancy Services of the British Library submitted to the President of the European Patent Office a study he had commissioned from them on the library and information services. The study, known as the Hill report, recommended that the Office's public information service should remain a part of PD 0.4, which was to be transferred to Vienna, putting its central library service under Directorate-General 2 (DG2), in Munich, and having a category B staff member run it.

The Administration invited the complainant to comment and he did so in September 1991. At meetings from 25 to 27 November a Presidential Committee decided to bring in the proposed changes as from 1 January 1992 but left it undecided whether an official in category A or B should manage the library.

On 13 February 1992 the President and other senior officers discussed with the complainant putting him on a post as head of the Library Research Service in Munich.

On 16 March the Principal Director of Finance revoked the complainant's authority to sign payment orders on the grounds that he had been "transferred".

By an electronic mail message of 20 March a personnel officer told him that his supervisor had named someone else to take over as reporting officer for library staff as from 1990-91.

In another such message of 20 March he asked the Director of Personnel for formal notice of transfer. By a letter of 31 March 1992 the Director told him that in keeping with the President's decision to reorganise PD 0.4 as from 1 January 1992 he had been transferred to PD 2.0 in DG2 under the supervision of the Principal Director of Professional and Administrative Support as head of the Library Research Service, still at grade A4.

On 27 April 1992 he filed an appeal against the transfer. The Director of Personnel informed him in a letter of 6 May 1992 that the President had referred the matter to the Appeals Committee.

In its report of 15 June 1993 the Committee recommended rejecting his claim to reinstatement in his former post but compensating him for moral injury.

By a letter dated 2 August 1993, which he impugns, the Vice-President informed him of the President's rejection of his appeal.

B. The complainant submits that the transfer was unlawful. Although such action is at its discretion the EPO owes staff a duty of care which in his case it failed to discharge. He derives an acquired right to his post as head of the library from the mention of that post in his letter of appointment. By making him end his career with "dubious consultancy work and other subordinate tasks" the EPO has impaired his professional reputation and undermined his health.

Even if transfer was unavoidable the EPO owed him at least a new post at the same level as his original one. Instead it stripped him retroactively of his responsibilities as reporting officer and gave him new and far lower duties. What is more, it withheld approval of his official missions and so kept him from carrying them out. It left him idle.

It failed to give him in good time the reasons for transfer. His supervisor, who could have explained them, made a mockery of the internal hearings by not turning up. That was in breach of his right to a fair hearing.

He wants the Tribunal to set the impugned decision aside; have him reinstated in his former post or, failing that, put on one of "similar standing"; order the EPO to "restore" his reputation both within and outside the Office; and award him costs.

C. The EPO submits in reply that the decision under challenge shows no fatal flaws: any damage he may have suffered was either of his own making or no worse than such as any official may expect in the ordinary course of his career.

Under Article 12 of the Service Regulations the assignment of a staff member is at the appointing authority's discretion. The Tribunal has consistently held that staff members have no acquired right to any particular post. Barring damage to some fundamental interest they must just put up with any inconvenience that reforms may cause.

Before carrying out reforms of the library the EPO consulted the complainant on the Hill report. Having discussed his case with the President in February 1992, he is wrong to allege that the Administration failed to state its reasons for reassigning him.

His new duties were not of lesser value: he merely gave up management duties that were at B category level so that he could concentrate on library work. The reason why he did not achieve more in his new job was his own distaste for the change, not an attempt by the Organisation to keep him idle; and his poor health and lack of initiative did not help. As for his missions, a shortage of funds called for thrift.

His new post struck a balance between the Organisation's needs and his wish to stay in his chosen field without moving to Vienna. Any harm to his reputation was due to his own disparaging comments about his new duties.

D. In his rejoinder the complainant seeks to set the record straight on several issues of fact and to answer the pleas in the reply. He denies saying he wanted to stay in Munich: had the EPO offered him an acceptable post in Vienna he would have taken it. Before suddenly losing his duties he was never unwell. To any impartial observer what the EPO did to him looked like covert disciplinary action.

E. In its surrejoinder the EPO observes that there is nothing in the complainant's rejoinder to alter its view of his case. If he was willing to go to Vienna why did he not apply for a recent vacancy there that would have suited him to a T? There being nothing about the reassignment that could have damaged his health, it was his own attitude that was to blame. Though he may not have liked the reassignment it was not disciplinary action.

#### CONSIDERATIONS:

1. The complainant joined the EPO on 1 February 1980 at its office in Munich at grade A2/A3. He was head of the Library and Public Information Department, which belonged to Directorate-General 4. He was promoted to grade A4 in the same post as from 1 August 1986.

2. On 1 January 1990 the Department was transferred to a new Principal Directorate for Patent Information.

3. In 1991 the President of the European Patent Office commissioned from the Consultancy Services of the British Library a study of the EPO's library and information services. The terms of reference covered review of the

organisation and management of those services and ways of improving them for the EPO's own staff and for other users. The report that the Consultancy Services made is dated July 1991 and has come to be known as the Hill report after the principal consultant.

4. The Hill report found that, unlike the Central Library Service at the EPO's office at The Hague, the library in Munich did not enjoy the confidence of management or patent examiners. There were, it said, weaknesses in the management of the Munich library at all levels, ineffective methods of budget and administrative control, a lack of incentives, a serious failure to ensure that the skills of the staff were kept up-to-date and poor communication between the two main libraries. The report recommended separating responsibility for the library itself and its various services. Thus the library became part of Directorate-General 2, in Munich, and after the takeover by the EPO of the International Patent Documentation Centre in Vienna the information services formerly provided in Munich were transferred to Vienna.

5. The complainant submitted written comments on the report in September 1991. On 30 January 1992 the President held a meeting on the subject with him and other senior officials. At a further meeting on 13 February 1992 the President gave him a draft job description for the post of head of a new Library Research Service, according to which his principal functions would be to advise the chairman of the Library Co-ordination Committee on options for the development of library and bibliographical services. By a letter of 31 March 1992 the Director of Personnel told the complainant that he was reassigned as from 1 January 1992 as head of the Library Research Service.

6. On 27 April 1992 he filed an internal appeal seeking reinstatement in his old post as head of the library as defined in the description he had been given on appointment in 1980. He contended that he had had no explanation of his reassignment and that the reduction in responsibility was damaging to his reputation. In its report of 15 June 1993 the Appeals Committee, to which his case had been referred, recommended rejecting his claim to reinstatement but awarding him compensation for moral injury by reason of certain actions and omissions by the Organisation before 31 March 1992. But on 2 August 1993 the President of the Office rejected all his claims and that is the decision he is now impugning.

7. Article 12 of the EPO Service Regulations reads:

"(1) The appointing authority shall, acting solely in the interests of the service and without regard to nationality, assign each permanent employee to the specific post for which he has been appointed.

(2) A permanent employee may be transferred within the Office either on the initiative of the appointing authority or at his own request to a vacant post which corresponds to his grade. ..."

Article 12 thus confers on the President of the Office as the "appointing authority" discretion in assigning and reassigning staff. His exercise of that discretion is subject only to limited review by the Tribunal, which will not interfere with the decision unless it shows a mistake of law or of fact or some other fatal flaw.

8. The complainant does not dispute that reforms in organisation are at the President's discretion. What he contends is that the decision he is challenging was based on criteria which were not objective and that the President disregarded the damage that such "sudden" reforms would do to his reputation; that he was denied his right to a hearing; that his new job is not commensurate with his grade and his former post; and that the President has acted in breach of good faith.

9. The Hill report leaves no doubt but that the reorganisation of the library and public information services was in the Organisation's interests. The complainant's comments on the report were obtained, and he had meetings with the President and senior officials about the consequences of acting on the recommendations in the report. He was informed on 13 February 1992 of his proposed transfer as head of the Library Research Service and was given a draft description of the post. Although his duties are mainly advisory there is no reason to suppose that he cannot make use in the new post of his unquestioned knowledge and experience. Whether the post is "commensurate" with his former post and grade depends on an objective test, namely the level of his duties. He has failed to satisfy the Tribunal that their level is not in keeping with his grade, which was the same after as before transfer. The essential difference was that he had been relieved of purely administrative tasks of day-to-day management that carried a lower grade anyway.

10. Though the details of the complainant's new post were not settled until 31 March 1992, the reforms were made retroactive to 1 January 1992. By notes of 6 and 16 March 1992 his name was removed from the list of officials authorised to sign payment orders and to give other administrative instructions. It is true that those notes were premature and should not have taken effect until he had been formally transferred. But because they were the inevitable consequences of the changes that were being discussed in February 1992 he cannot be said to have suffered any moral injury. In any event he claims no award of damages under that head.

11. Mr. Gérard Giroud was responsible for writing the complainant's staff report for 1990-91, which was overdue. Mr. Giroud's failure to appear before the Appeals Committee prompted adverse comment from the Committee. With the Committee's consent its chairman put questions to him in writing on 25 January 1993 and he answered in writing on 16 February, but the Committee found his answers unsatisfactory. A further hearing in the presence of Mr. Giroud was agreed upon, but again he failed to attend.

12. The delay in the filing of a staff report on the complainant for 1990-91 in the context of the reorganisation recommended by the Hill report affords no grounds for any award of damages; nor can Mr. Giroud's failure to give satisfactory evidence to the Appeals Committee, deplorable though it be, have had any effect on the outcome of the issues raised in this complaint.

13. The Organisation assumed that the complainant did not wish to move to Vienna. He states that he was not offered any position there but that if he had been offered an acceptable one he would have taken it. But that is a matter which he might have raised with the President of the Office, and the evidence does not reveal that he ever did so.

14. The conclusion is that the Organisation treated him fairly over his reassignment and that none of his objections is sound.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, Vice-President of the Tribunal, Mr. Pierre Pescatore, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 13 July 1994.

William Douglas  
P. Pescatore  
Mark Fernando  
A.B. Gardner