

*Registry's translation,  
the French text alone  
being authoritative.*

## **109th Session**

## **Judgment No. 2935**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mrs E. P. against the European Patent Organisation (EPO) on 14 October 2008, the EPO's reply of 12 February 2009, the complainant's rejoinder of 9 March, the Organisation's surrejoinder of 17 June, the complainant's additional submissions of 11 November and the EPO's final comments thereon of 18 December 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. Facts relevant to this case are to be found in Judgment 2557, delivered on 12 July 2006, concerning the complainant's first complaint. Suffice it to recall that the complainant, a French national, joined the European Patent Office, the secretariat of the EPO, after having successfully completed a course in journalism at a private institute in France in 1993 and worked in various fields of journalism. She was first employed as an external expert in communication and was subsequently appointed as an administrative employee, at grade B1, in April 1999. She was promoted to grade B2 in December 2001. From

the beginning of 2003 her health deteriorated, resulting in a long period of sick leave subsequent to which she resumed work at 60 per cent in November 2003.

In her first complaint, the complainant challenged the rejection of her request to be retroactively regraded to category A, in recognition of her training and professional experience. The Tribunal stated in Judgment 2557 that “if any final decision was taken with respect to her qualifications, it was taken when she joined the EPO [...] in 1999, and was not then contested”. Nonetheless, it found that, although the complainant had been assigned to a post as an administrative employee, she had performed the duties of a journalist at a level in excess of that called for by her job specification. This, in the Tribunal’s view, constituted an affront to her dignity which was a significant factor in her illness and which warranted an award of moral damages in the amount of 5,000 euros. The Tribunal also ordered the EPO to pay the complainant 20,000 euros in addition to the sum it had already paid to her, by way of compensation.

On 6 October 2004 the Office advertised the post of administrator in grade group A4/1. Vacancy notice INT/EXT/3982 included among the minimum qualifications required of candidates a “[d]iploma of completed studies at university level or – in exceptional cases – equivalent professional experience”. The complainant applied for this post but she was informed by a letter of 19 January 2006 that her application had been unsuccessful.

On 7 April 2006 she lodged an appeal against the decision not to select her for the post of administrator. The EPO issued its position paper on 27 August 2007, following which the complainant and the Administration made further submissions to the Internal Appeals Committee. In its opinion issued on 28 May 2008, the Committee found that the Selection Board had failed to exercise properly its discretion in refusing to recognise the complainant’s diploma as being equivalent to a diploma of completed studies at university level and, consequently, in deciding not to invite her for an interview. It considered however that, even if the complainant’s application had been properly assessed, the selection procedure would not necessarily

have resulted in her being appointed to the post of administrator. It recommended *inter alia* that the selection procedure be annulled, that the post be re-advertised and a new selection procedure carried out and that the complainant be awarded 2,500 euros in moral damages. Two members of the Committee considered in an addendum to the opinion that the amount of moral damages might be underestimated. In their view, the prejudice suffered by the complainant ought not to be considered in isolation but in light of other factors, and particularly of the Tribunal's findings in Judgment 2557. They also considered that, in the event that her state of health prevented her from resuming her duties "an adequate financial compensation might be more appropriate".

By a letter of 28 July 2008 the complainant was informed that the President of the Office had decided not to endorse the Committee's finding concerning her diploma but to allow her appeal in part. In view of the fact that she had been receiving an invalidity allowance since 1 July, the President considered that the recommendation to the effect that a new selection procedure be carried out was no longer satisfactory in view of the fact that she would not be in a position to take part in a new selection procedure and that a higher amount of moral damages was therefore more appropriate. The President had also decided to award her 5,000 euros in moral damages. That is the impugned decision.

B. The complainant submits that the EPO wrongly considered that her diploma was insufficient so as to keep her in a lower grade while performing A-grade work. This mistake, she says, contradicts the views expressed by the Tribunal in Judgment 2557 and renders the whole selection procedure unlawful. In addition, the President failed to provide grounds for departing from the Internal Appeals Committee's finding concerning her diploma.

According to the complainant, had her application been properly assessed, she would have been selected for the post of administrator, given that she was the only internal candidate and that the EPO has a "duty to favour internal candidates". She points out in this respect that two members of the Selection Board testified before the Committee

that they had advocated interviewing her, but that the Administration had advised them that her diploma was insufficient.

The complainant also submits that the President failed to evaluate properly the amount of moral damages which should be awarded to her. She emphasises that the unlawful rejection of her application took away her last opportunity of building a career within the Organisation. She alleges that she has been the subject of continuous “vicissitudes” since the delivery of Judgment 2557, which have seriously affected her health. She further contends that both the selection procedure and the internal appeal proceedings took too long.

She asks the Tribunal to set aside the impugned decision and to order the EPO to award her damages equivalent to the difference between her B-grade salary and allowances and the A-grade salary and allowances she would have received from 19 January 2006 until 1 July 2008 – the date when she ceased to perform her duties and started receiving an invalidity allowance – had her application been successful. In addition, she seeks the payment of the difference between the invalidity allowance she currently receives and that which she would have received if her application had been successful, with retroactive effect from 1 July 2008 and with prospective effect from the date of delivery of this judgment, as well as any corresponding adjustment of the lump sum payable under the Service Regulations and Pension Scheme Regulations. She claims interest at the rate of 8 per cent per annum on all sums awarded. She also claims moral damages in the amount of at least 10,000 euros, punitive damages and costs. Lastly, she seeks a declaration that her diploma entitled her to apply for an A-grade post.

C. In its reply the EPO submits that the complaint is unfounded. It contends that it had the right to evaluate whether the complainant’s diploma was a diploma of completed studies at university level, and that she was well aware of the reasons for refusing to recognise her diploma as such, given that they had already been stated in the Organisation’s submissions in connection with the case that led to Judgment 2557. It considers that this issue is no longer open to legal review because the Tribunal ruled in that judgment that the final

decision, if any, with respect to the complainant's qualifications was taken when she was appointed as an administrative employee in 1999, and was not then contested. Subsidiarily, it maintains that her diploma is not a diploma of completed studies at university level because it entails only three years of study and corresponds to the French degree of "*licence*", whereas the Office requires the degree of "*maîtrise*", which entails four years of study.

The Organisation argues that there is no duty to treat internal candidates more favourably and that there is no entitlement to be appointed to a vacant post.

It also argues that the amount of moral damages awarded was adequate because it had been increased compared to the amount set by the Internal Appeals Committee in view of the fact that the complainant could no longer participate in a new selection procedure. Further, it is in line with the views expressed by the two members of the Committee in their addendum to the latter's opinion. The EPO submits that an award of punitive damages would be inappropriate, because it did not act in bad faith, and it asks the Tribunal to order that the complainant bear her costs. It notes that she neither enquired about the status, nor objected to the length of the selection procedure or the internal appeal proceedings and it submits that she has not established that it was responsible for her state of health.

D. In her rejoinder the complainant presses her pleas. She disagrees with the EPO's assertion that the issue of whether her diploma was a diploma of completed studies at university level is *res judicata*. She submits that, according to the case law, the length of studies is not a valid criterion for deciding whether or not to recognise a diploma for the purpose of employment, and that there is no basis for requiring the degree of "*maîtrise*" for A-grade posts.

The complainant emphasises that she did not suggest that there was a duty to treat internal candidates more favourably, but rather that her legitimate expectations and the Organisation's duty of care should have been taken into consideration when evaluating her application for the post of administrator. She asserts that the EPO misinterprets the

views expressed by the two members of the Committee in their addendum; they did not consider higher damages because she could not participate in a new selection procedure but because of the series of injuries she had suffered.

E. In its surrejoinder the Organisation maintains its position in full, stressing that, even if no final decision had been taken in 1999 with respect to the complainant's qualifications, the request to recognise her diploma as a diploma of completed studies at university level would be time-barred. It adduces evidence showing that, in 2000 and 2002, she had made requests to that effect and notes that she did not then initiate an appeal against the implied rejection of her requests. It also produces a letter of 12 February 1992 from the President of the Office to the Secretary General of the French National Institute for Industrial Property which shows that, since then, the Office has required the degree of "*maîtrise*" for A-grade posts.

F. In her additional submissions the complainant objects that the letter of 12 February 1992 relates to an informal agreement, which does not have force of law, and that it is in any event irrelevant as it concerns the requirements for examiners' posts.

G. In its final comments the Organisation states that, for all A-grade posts, not just examiners' posts, it has consistently interpreted the expression "diploma of completed studies at university level" as referring to a degree obtained after at least four years of study.

## CONSIDERATIONS

1. The complainant, a French national, is a former employee of the European Patent Office, which she joined in 1997. In 1999 she was appointed to the post of administrative employee at grade B1. She was promoted to grade B2 in 2001 and to grade B3 in 2004. On 1 July 2008 the Organisation granted her an invalidity allowance, because she was unable to work owing to ill health.

2. On 6 October 2004 the Organisation published a vacancy notice for a post of administrator in grade group A4/1. The notice described the main duties of this post as follows:

- “• Write press information, articles and Questions and Answers
- Help to produce online communication (internal and external)
- Liaison with local journalists
- Help to plan the departmental budget, and report to the heads of Media Relations and Internal Communication”

and the following minimum qualifications:

“Diploma of completed studies at university level or – in exceptional cases – equivalent professional experience. Excellent knowledge of one official language and ability to understand the other two.”

The complainant applied for this post on the strength of her theoretical training as a journalist in France and the experience which she had acquired in the field of journalism, especially within the Office.

On 19 January 2006 the Administration informed her that after careful consideration by the Selection Board her candidature had been rejected; it regretted that the procedure could not have been completed earlier.

3. The complainant lodged an internal appeal against this decision. In its opinion of 28 May 2008 the Internal Appeals Committee found that the procedure had not been conducted in accordance with the rules applying to a competition open to both internal and external candidates. It further considered that the Administration had exercised its discretion improperly by excluding the complainant from the selection procedure on the grounds that her diploma and professional experience did not satisfy the requirements of the post advertised. On the other hand, it left unanswered the question of whether procedural flaws at the preselection and selection phases should themselves lead to the annulment of the recruitment procedure, since it was of the opinion that the errors of judgement during the selection procedure were sufficient reason to annul it. Given that two and a half years had elapsed since the vacancy notice had been published, the Board considered that the competition should be

reopened. It suggested that the complainant's claim for material damages should be rejected on the grounds that she would not necessarily have been appointed to the post, even if the selection procedure had been conducted properly. It recommended, however, that the complainant be awarded moral damages of 2,500 euros.

While they endorsed this recommendation, a minority of Committee members were of the view that the amount of moral damages ought to be higher and that the complainant should be awarded appropriate compensation in the event that she was unable to resume work owing to the deterioration in her health.

4. On 28 July 2008 the President of the Office decided to follow the Internal Appeals Committee's recommendations in part, although she emphasised that she disagreed with its opinion regarding the level of the vocational training on which the complainant relied. She likewise refused to order the reopening of the selection procedure on the grounds that the complainant was already in receipt of an invalidity allowance and therefore could not take part in the new selection procedure. In view of the serious procedural flaws pinpointed by the Internal Appeals Committee, the President decided to increase the award of moral damages to 5,000 euros and to order the reimbursement of any reasonable costs incurred by the complainant during the proceedings.

That is the decision impugned before the Tribunal.

5. The complainant claims punitive damages.

This claim may be summarily dismissed because it is tantamount to asking the Tribunal to make an example of the Organisation by obliging it to pay compensation exceeding the material and moral injury actually suffered by the complainant. Such a claim may be allowed only in exceptional circumstances, for instance where an organisation's conduct has been in gross breach of its obligation to act in good faith. The conduct objected to in this case may not be qualified in such terms.

Moreover, the complainant's argument in support of this claim is merely an extension of that put forward in support of her claim for higher compensation than that awarded to her.

6. The complainant also takes issue with the Organisation for having followed the Internal Appeals Committee's recommendation and for not having awarded her, in respect of the period prior to her invalidity, damages corresponding to the difference between the salary of the post for which she had applied and that of the post she held until she obtained her invalidity allowance. Moreover, she maintains that the latter should be calculated on the basis of the salary which she would have received had she been appointed to the post for which she applied, and not on the basis of that received for her last position. In support of these claims she argues that the Internal Appeals Committee ought to have recommended her appointment to the post advertised and not the reopening of the selection procedure. In her view, that would have been the right course of action, because she met the requirements stipulated in the vacancy notice and was the only internal candidate out of some 60 applicants.

This plea must be dismissed, because it has not been established that the complainant was the best candidate and there is no legal basis for her contention that, all things being equal, the Organisation must give preference to internal candidates.

7. The Organisation denied the complainant the opportunity to take part in the selection procedure in the instant case, whereas she submits that she met the requirements laid down in the vacancy notice published on 6 October 2004.

This notice principally required candidates to hold, not a university degree, but a "diploma of completed studies at university level". In the absence of such a diploma, it was necessary to examine whether candidates had equivalent professional experience.

(a) It must first be pointed out that, contrary to the EPO's submissions, Judgment 2557 does not answer the question of whether the complainant's diploma in journalism satisfied the requirements of

the vacancy notice, since this judgment did not concern the complainant's application for an A-grade post.

Contrary to the Organisation's contentions, in the instant case the complainant may assert that she was qualified for the post, since a decision – even an implicit one – that she did not possess the requisite qualifications could be taken only in respect of an A-grade post. Although the complainant has applied for several A-grade posts, it has not been established that the Tribunal has ever ruled on any of these applications.

(b) The Internal Appeals Committee acknowledged that the complainant's diploma satisfied the requirements of the vacancy notice and it also emphasised that, if the Selection Board regarded this diploma as insufficient, it should have considered subsidiarily whether the complainant's professional experience did not make up for this shortcoming.

In departing from the Committee's opinion regarding the level of the diploma held by the complainant, the President of the Office did not, however, express any opinion in respect of the possible equivalence of her professional experience, the subsidiary requirement set forth in the vacancy notice.

The Organisation's arguments in its reply and surrejoinder do not clearly establish that the diploma from a private institute of journalism produced by the complainant – which is not, strictly speaking, a university diploma – is not a "university level" diploma within the meaning of the vacancy notice. It was, however, incumbent upon the Organisation to prove this fact, bearing in mind the content of the document which the French Ministry of National Education had sent to it on 15 October 2002 in reply to its query regarding the description of this qualification.

(c) While the complainant certainly had no guarantee that she would be appointed at the end of the selection procedure, the possibility that she might have had a real chance of being the successful candidate cannot be ruled out on the basis of the evidence on file. The Tribunal must therefore acknowledge that she was denied that chance and hence suffered material injury which may be said to

have a sufficient causal link to her unjustified exclusion from the selection procedure as a result of an error of law on the part of the Organisation. This injury must be redressed. Since the complainant can no longer submit her application in a new competition owing to her invalidity, this redress must take the form of the payment of compensation, which the Tribunal sets at 20,000 euros.

8. The President of the Office has awarded the complainant moral damages in an amount which she determined bearing in mind certain procedural flaws pinpointed by the Internal Appeals Committee. However, she failed to take account of two relevant factors.

Firstly, she disregarded the moral injury caused by the complainant's unjustified exclusion from the selection procedure in the circumstances described above.

Secondly, she ignored the injury suffered by the complainant on account of the excessive length of the selection and appeal procedures.

In this connection, the Tribunal notes that, whereas it is in the common interest of candidates and international organisations that appointment procedures be conducted with dispatch, nearly four years elapsed between the publication of the vacancy notice on 6 October 2004 and the adoption of the impugned decision. This extraordinarily long period of time was not justified by any particular circumstances.

In its reply, in taxing the complainant with not having complained about the length of the selection and appeal procedures, the Organisation overlooks the fact that it is the duty of organisations to ensure of their own accord that procedures are completed promptly and within a reasonable period of time.

On 19 January 2006 the Administration had already stated in a letter to the complainant that it regretted the length of the selection procedure. This circumstance and the complainant's fragile health made it all the more necessary for the Organisation to take particular care to ensure that the delay which had built up during the selection procedure was not exacerbated by an excessively long appeal procedure.

It follows that the amount of moral damages which the complainant was awarded by the President of the Office must be increased by 10,000 euros.

9. It may be concluded from the above that the impugned decision must be set aside inasmuch as it did not recognise the complainant's right to material damages and awarded her only 5,000 euros for moral injury. The Tribunal considers that the material injury will be fairly compensated by an award of damages in the amount of 20,000 euros.

10. As she succeeds in part, the complainant is entitled to costs, which should be set at 5,000 euros.

### DECISION

For the above reasons,

1. The impugned decision is set aside to the extent indicated under 9, above.
2. The EPO shall pay the complainant material damages of 20,000 euros.
3. It shall pay her moral damages in the amount of 10,000 euros in addition to the sum of 5,000 euros already granted in this respect.
4. The EPO shall also pay the complainant 5,000 euros in costs.
5. All other claims are dismissed.

In witness of this judgment, adopted on 7 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet