

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

FIFTY-FIRST ORDINARY SESSION

In re MICHL

Judgment No. 585

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed against the European Patent Organisation (EPO) by Miss Gertrud Michl on 3 August 1982 and brought into conformity with the Rules of Court by 1 November and the EPO's reply of 19 January 1983;

Considering Judgment No. 558;

Considering the complainant's rejoinder of 20 May and the EPO's surrejoinder of 28 July 1983;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 3 and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and disallowed the complainant's application for oral proceedings;

Considering that the material facts of the case are as follows:

A. The complainant, who is a citizen of the Federal Republic of Germany, joined the European Patent Office in 1977 as a grade B3 secretary. In September 1979 she moved to the Formalities Section in General Directorate 2, where she was to help with training courses for EPO examiners. She was put on a B3 post lent by another department. On 18 September she wrote to the Director of General Administration saying that her new duties were too limited and asking for more demanding work. On 24 September the Director replied that he expected her qualifications to be put to good use and that, though free to seek another transfer, in the meantime she must just carry on. In December 1980 a new post was included in the budget for 1981, and on 19 February 1981 the President of the Office transferred her to it with effect from 1 January and with no change of duties. By an evaluation dated 19 March 1981 her duties were found to correspond to those of a grade B3 secretary, and the Principal Director of Personnel so informed her on 10 April. On 8 July she appealed to the President against the grading. In its report of 4 November 1981 the Appeals Committee, to which her case had been referred, recommended a re-evaluation or substituting the President's own evaluation of her post. The President preferred re-evaluation and on 3 May 1982 informed her, citing a re-evaluation by the Organisation Directorate of 4 January, that the grade was confirmed at B3. That decision, notified to her on 5 May, she now impugns. On 1 August 1982 she was transferred to a B4 post in the Formalities Section.

B. The complainant alleges that her job description omits several items and mistakenly likens her duties to those of a B3 secretary. The impugned decision therefore overlooked essential facts and was based on an error of fact. The Administrative Council approved the creation of her post without seeing the job description, and it was the President who determined the grade. Yet Article 3 of the Service Regulations states: "Acting on a proposal by the President ... the Administrative Council shall determine the grade justified by [the job description...]" From September 1979 her position was irregular because she held a post of which she did not perform the duties. She invites the Tribunal to quash the impugned decision and declare that her duties corresponded to grade B4 and to award her one Deutschmark as token damages and 1,000 marks as costs.

C. In its reply the EPO contends that since the grade of the complainant's post matched her job description the President had no reason to propose to the Council either a different classification or a change in the level of her duties. It is for the President to decide whether the grading is right, and the Tribunal has only a limited power of review. In fact the decision shows no defect which would warrant setting it aside. The post she held from 1 January 1981 until the date of her promotion to B4 was correctly classified B3, the sole valid criteria under Article 3(1) of the Service Regulations being "the duties involved, the level of responsibility and the qualifications required", and

her own qualifications being irrelevant. By comparing B3 and B4 duties the EPO seeks to show that the complainant's post was B3. From September 1979 to December 1980, when she held the "borrowed" post, her duties were, as she admits, the same and she was therefore correctly classified B3 also at that time. There was nothing wrong with putting her on that post until one with the right job description was created.

D. On 28 February 1983, having received the EPO's reply, the complainant applied for disclosure of the re-evaluation by the Organisation Directorate on which the decision she impugns was based. By Judgment No. 558, dated 30 March 1983, the Tribunal ordered the EPO to file the item, and the Registrar forwarded it to the complainant on 19 April.

E. The complainant submits in her rejoinder that the Organisation Directorate overlooked essential facts. Its report of 4 January 1982 is at variance with the original evaluation and says that her duties are mainly routine: in fact they require initiative, an ability to work independently, a talent for organisation and a knowledge of English, French and German. The last alone warrants B4. She again alleges breach of Article 3 of the Regulations: the proper procedure is for the Office to draw up a post description and propose the grade, then for the Council to budget for the post and approve the grade. Here the Council budgeted for the post in December 1980, and not until 19 March 1981 was the grade determined. In determining it himself the President acted ultra vires. Besides, the post approved by the Council did not match her actual duties as defined by her job description. She increases her claim for costs to 2,000 marks.

F. In its surrejoinder the EPO denies that there is any discrepancy between the evaluation of 19 March 1981 and the re-evaluation of 4 January 1982. Nor have essential facts been overlooked. While describing her duties as mainly routine the re-evaluation report did not deny scope for initiative since, like the original evaluation albeit in other terms, it recognised they must be "adapted" to circumstances. Ability to work independently and a talent for organisation are required, but, as the job description makes plain, only in performing day-to-day tasks. The duties do not require knowledge of three languages, and in any case the Appeals Committee did not say such knowledge warranted B4. There was no breach of Article 3. In October 1977 the Council approved the grades for standard job descriptions which were set out in CI/Final 18/77. If a new position fits such a description all the President need do is ask the Council to create a post of the right grade. This is the practice followed since 1977, and it was applied in the complainant's case. The post introduced in the 1981 budget for the complainant was analogous to that of a B3 secretary as described in CI/Final 18/77. Her allegation that the new post did not match her actual duties is new and inconsistent with what she has said before. Besides, when put on the new post she was told that she would continue to perform the same duties, and she never challenged that at the time.

CONSIDERATIONS:

Receivability

1. The EPO has taken several decisions about the complainant.

She was appointed with effect from 1 November 1977 to a grade B3 post in Directorate 4.4.

On 17 September 1979 she was moved to General Directorate 2 and, because her actual post was not covered by the budget notionally put on post B3/1144.

On 11 December 1980 the Administrative Councils approved the inclusion of her actual post in the budget for 1981 and on 19 February 1981 the President of the Office decided to keep her on that post.

On the strength of a report made on 19 March 1981 by Directorate 4.1 the President concluded on 10 April that she should hold grade B3. He thereby declined to put the question of her reclassification to the Administrative Council.

She appealed to the Appeals Committee, and in a report issued on 4 November 1981 the Committee recommended that the President should have her grading reviewed or else review it himself.

On 3 May 1982, after again consulting Directorate 4.1, the President upheld his decision of 10 April 1981 not to review the grading.

No internal appeals were submitted against the decisions taken before 10 April 1981 within the three-month time limit set in Article 108(2) of the Service Regulations. That is why the Appeals Committee declined to hear the

complainant's appeal on the merit in so far as it challenged the decision of 14 February 1981. Under Article VII(1) of the Statute of the Tribunal a complaint is not receivable unless the internal means of redress have been exhausted, and accordingly the Tribunal will not entertain appeals against any of the decisions taken before 10 April 1981. It will review only those of 10 April 1981 and 3 May 1982, both of which concern her grading, because she did submit in time an internal appeal against the first of those decisions.

The right to a hearing

2. The complainant observes that neither she nor her supervisors were consulted by Directorate 4.1 about the report which was made on the Appeals Committee's recommendation. The implication is that she was denied her right to a hearing.

What the right requires is that the parties should have a chance to state their views before any decision is taken to their detriment. It does not mean that they must be allowed to comment at every stage in the procedure. In particular they have no right to be consulted by a branch whose opinion is sought by the decision-maker, and Directorate 4.1 was not required to give the complainant a hearing when it was consulted for the second time about her grading.

There is another material issue, the disclosure of the report, but the Tribunal ruled on it in Judgment No. 558, in which it ordered the EPO to produce the report and so gave the complainant an opportunity to comment.

The merits

3. A decision against a change in grading is a discretionary one, and according to its case law the Tribunal will quash such a decision only if it was taken without authority, or in breach of a rule of form or of procedure, or was based on a mistake of fact or of law, or if essential facts were over-looked, or if there was abuse of authority, or if clearly mistaken conclusions were drawn from the evidence.

4. The complainant's first plea is that the President of the Office overlooked essential facts and drew clearly mistaken conclusions from the evidence.

In taking his decision the President had to consider three opinions, among other things. The first one, which came from Directorate 4.1, was against regrading although it recognised that the complainant's duties did require some talent for organisation and were the easier to perform for knowledge of the three official languages. The second recommendation, the Appeals Committee's casts doubt on the soundness of the first, said to rest on incomplete and mistaken findings. Thirdly, Directorate 4.1 reviewed its report of 19 March 1981 and repeated its earlier conclusions on the grounds that the complainant's duties were largely a matter of routine.

There is no reason to suppose that the President disregarded any of those recommendations or failed to weigh the arguments, and the Tribunal rejects the plea that essential facts were overlooked.

The matter in dispute which the President had to settle was one of a kind which turn on more or less subjective considerations and the differences of opinion were understandable. In preferring one solution to another he drew no clearly mistaken conclusion from the facts. It would have been within the bounds of his discretion to follow the Appeals Committee and decide in the complainant's favour; but he was also at liberty without exceeding those bounds, to endorse the opinion of Directorate 4.1.

5. The complainant alleges twofold breach of Article 3 of the Service Regulations. First, the inclusion of her post in the 1981 budget was approved before there was a post description and a determination of grade; and, secondly, the description does not match her actual duties.

These grievances arise out of the Council's approval of the complainant's post on 11 December 1980, and the filling of the post by the President on 19 February 1981. Since both decisions were taken before 10 April 1981 the complainant may not challenge them, for the reasons given in 1 above, and the Tribunal dismisses the claims without examining them further.

In any event refusal to review the complainant's grading constituted no breach of Article 3. Article 3(2) says that it is the Administrative Council which may decide to reclassify a post on a proposal by the President. Since the President saw no reason for a regrading he had no proposal to put to the Council.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. André Grisel, President of the Tribunal, the Right Honourable Lord Devlin, Judge, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 20 December 1983.

(Signed)

André Grisel

Devlin

E. Razafindralambo

A.B. Gardner