NINETY-SEVENTH SESSION

Judgment No. 2355

The Administrative Tribunal,

Considering the complaint filed by Mr K. K. against the European Patent Organisation (EPO) on 7 April 2003 and corrected on 10 June, the Organisation's reply of 10 September, the complainant's rejoinder of 23 November 2003 and the EPO's surrejoinder of 18 February 2004;

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. The complainant was born in 1954 and has Dutch nationality. He joined the European Patent Office – the EPO's secretariat – in 1987 as a service employee at grade C2. He was promoted to grade B2 in 1989 and to grade B3 in 1996. He was retired from the service of the Office on 1 May 2002 and awarded an invalidity pension. At the material time he was employed in the Sequence Listings (SEQL) Search Assistance Services (SAS) 5 unit in Directorate Receiving Section and SAS Units (RSS).

On 29 June 1999 the head of directorate 1.2.12 sent a note to the Interim Director of RSS stating that he had been informed that the complainant was suffering from repetitive strain injury and that the EPO's Medical Officer had ordered "absolute rest". Noting that a large number of EPO examiners depended on the complainant's work output, and referring to "other problems we recently discussed", the head of the directorate proposed to take measures to replace the complainant. The Interim Director of RSS immediately discussed the matter with the head of directorate 1.2.12, the manager of SAS 5, and the complainant's line manager. He also consulted a member of the Personnel Department. Later that same day, the manager of SAS 5 instructed the Working Group "Staff Matters" to seek a replacement for the complainant and to arrange for the latter to be transferred to another SAS unit.

By a note dated 14 July 1999 the Interim Director of RSS informed the complainant that with effect from 19 July 1999 he would be transferred, for an initial period of three months, to SAS 4. Since the complainant was on leave at the time, the note was forwarded to his home address. A copy was also displayed on the Receiving Section notice board.

On 22 July the complainant wrote to the Interim Director of RSS, acknowledging receipt of the note of 14 July but rejecting the transfer on the grounds that it had been decided in his absence without consulting him and that no reasons for the decision had been given. He asserted that he would resume his functions in SEQL on returning from leave. The Interim Director of RSS replied, in a letter of 30 July 1999, that transfers at the same grade within the RSS were not subject to the agreement of the individual concerned; that several officials had been consulted prior to the decision; and that the complainant would be informed of the reasons for the transfer as soon as he returned to work.

The complainant was placed on sick leave with effect from July 1999 and was unable to return to work from that time onwards. However, on 25 August and 8 October 1999 he attended meetings with the Interim Director of RSS, who explained that the decision to transfer him was based on three reasons: firstly, the complainant's inability to clear a backlog of work was having a very serious impact on the work of other departments and there was uncertainty as to whether his medical condition would improve in the immediate future; secondly, the Medical Officer had recommended that he be assigned less stressful duties; and thirdly, there was a complete breakdown in communication between the complainant and two of his supervisors, namely the head of directorate 1.2.12 and the manager of SAS 5.

On 10 April 2000 the complainant wrote to the President of the Office asking to be awarded 50,000 Dutch guilders in damages for moral injury. He explained that prior to the decision to transfer him his physical and mental health had already been affected by the lack of compassion and care of his supervisors, but that the transfer decision, "either taken on the pretext of administrative reform or as a substitute for punitive measure" was manifestly an "abuse of power". In particular, he complained that the transfer had detrimentally affected his promotion prospects and that the way in which it had been implemented had humiliated him, damaged his reputation and caused further damage to his health.

By a letter of 17 May 2000 the President rejected his request, reiterating the reasons that had been given to the complainant during his meetings with the Interim Director of RSS. Noting that the backlog in SEQL had been rapidly brought under control by the complainant's successor, he concluded that the decision, which had "ensured the smooth functioning of the SEQL service whilst at the same time seeking to protect the interests of an absent member of staff", had been taken with due care and attention. He urged the complainant to accept the "fresh start" he had been offered in SAS 4.

For reasons that remain unknown, the President's letter of 17 May 2000 was not received by the complainant. Assuming that there had been no reply to his request for damages, the complainant lodged an internal appeal on 30 August 2000 against the implied decision rejecting his request. On 12 September the President sent the complainant a copy of his letter of 17 May and invited him to reconsider his decision to appeal. That same day, the Director of Personnel Development wrote to inform the complainant that the matter had been referred to the Appeals Committee, the President having considered, after an initial examination of the case, that his request for damages could not be granted.

In its opinion dated 6 November 2002, the Appeals Committee held that although the transfer was "legally justifiable" on the basis of the difficult work situation in SEQL and the breakdown in relations between the complainant and one of his supervisors, it did not fulfil in every respect the legal requirements applicable to such measures. The Committee considered that the transfer did not constitute a veiled disciplinary measure, but that since it had had "a similarly serious effect" on the complainant, it was necessary to attach particular importance to the issue of whether he had been "informed to the extent required and in good time, and given the opportunity to comment, from the point of view of his right to be heard, as laid down in Article 93(5) [of the Service Regulations] for disciplinary proceedings". It concluded that his claim for damages should be allowed in part, on the grounds that his right to be heard had been denied, that the decision had been published before the complainant was aware of it and that he had been understandably hurt by the fact that his office had been taken over immediately and his personal possessions stored without trace for some three years.

By a letter of 13 January 2003 the Interim Director of Conditions of Employment and Statutory Bodies informed the complainant that the President had decided to reject the appeal for the reasons given in his letter of 17 May 2000, as well as those put forward by the Office during the appeal proceedings. That is the impugned decision.

B. The complainant submits that the essence of his claim for damages is that the proper procedures applicable to transfers were not followed by the Office. He argues that the work situation in his unit, though clearly problematic, was not such as to justify transferring him "without consultation, without notice and without consideration". He asserts that the difficult work situation was largely due to failure by management, which had created a bottleneck situation in his unit. Regarding his medical condition, the complainant submits that there was no credible medical evidence justifying a transfer without further consultation, since the information concerning his health merely amounted to "unconfirmed reported comments by persons not qualified to make a medical judgement". As for the breakdown in relations with his supervisor, the complainant points out that the Appeals Committee based that finding on accusations of misconduct reported by one of his supervisors, who allegedly wished to initiate disciplinary proceedings against him. He states that whilst the Committee may have seen a meaningful difference between an act amounting to veiled disciplinary action and one "having a similar effect", from his point of view his right to be heard was violated in either case.

The complainant submits that the level of damages indicated by the Appeals Committee may represent sufficient compensation for the denial of his right to be heard, but that it does not reflect the harm caused to him by the premature displaying of the transfer decision on the notice board, nor the Office's "cavalier treatment" of his personal possessions, nor the "pain and suffering" caused to him and the "detrimental effect on his health and employability". He asserts that he is now certified as unfit for work and permanently unemployed as a direct consequence of the Office's "uncaring and unlawful conduct".

He also accuses the Office of showing "contempt for the law and for proper procedure and a total lack of respect for the rights of staff" by omitting to address the legal arguments put forward by him, by failing to ensure that the President's letter of 17 May 2000 was received by him, by offering no apology and by taking an unduly long time to reply to his appeal submissions.

He claims moral damages, which he evaluates at 40,000 euros, and costs.

C. The defendant Organisation replies that the complaint is unfounded. It dismisses the complainant's criticism of the Appeals Committee's findings and submits that the testimonies gathered during the Committee's hearings clearly established that the transfer did not amount to a veiled disciplinary action. It concedes that doubt remains as to whether the Medical Officer actually recommended a transfer on the grounds of ill health, but argues that the difficult work situation in SEQL and the breakdown in relations between the complainant and one of his supervisors, both of which were recognised by the Appeals Committee, were sufficient to justify the transfer.

The defendant explains that the President rejected the Committee's recommendation because he considered its reasoning to be illogical: if the transfer was not a veiled disciplinary action, then the procedure for disciplinary matters, including the right to be heard, was not applicable, regardless of whether the complainant perceived his transfer as a disciplinary measure. Referring to Judgment 1496, the defendant argues that there is no mandatory requirement to hear an individual whom it intends to transfer where, as in the present case, the matter is urgent and the transfer will not harm the employee's dignity or private interests.

The Organisation considers that the displaying of the transfer decision on the notice board cannot objectively be considered to have been humiliating, since such publication is required by the Service Regulations and the transfer was not disciplinary in nature. Regarding the treatment of his personal possessions, the Organisation submits that the fact that they could not be found at a particular time was not due to deliberate conduct on its part. It points out that the complainant's possessions have since been found and that he has not reported any loss or damage. It sees no justification for an award of damages.

The defendant rejects as unsubstantiated the accusation that it caused damage to the complainant's health, noting that the decision to retire him on grounds of invalidity, which he did not challenge, made no reference to an occupational origin of his health condition. It also dismisses his allegations relating to the internal appeal proceedings.

D. In his rejoinder the complainant maintains his arguments in full. He dismisses as "spurious" the Organisation's argument that his transfer was urgent, observing that the Appeals Committee shared his view on this issue, and emphasises that even if the transfer had not been considered to have had an effect similar to that of a disciplinary measure, he should nevertheless have been heard by the Office.

E. In its surrejoinder the defendant maintains its position, noting that the complainant's rejoinder introduces no relevant new argument to support his case.

CONSIDERATIONS

1. The complainant, a former administrative employee at grade B3, was transferred to a post of equivalent grade, for an initial period of three months, while absent on leave. He was informed of the transfer by a note of 14 July 1999, but the decision was also published that same day on an EPO notice board, and was thus known to other staff before the letter reached him.

2. Shortly before his period of annual leave, at the end of June 1999, he had informed his supervisor that he was suffering from repetitive strain injury (RSI) and that the Medical Officer had ordered absolute rest. He was in fact placed on sick leave from July 1999 onwards, not for RSI but for depression, and thereafter he never returned to work. He was retired from the service of the EPO on 1 May 2002 and awarded an invalidity pension.

3. The complainant appealed against the decision to transfer him, claiming moral damages on the grounds that the transfer was a veiled disciplinary sanction which, apart from contravening the applicable procedure, had compromised his promotion prospects, humiliated him and caused serious damage to his health. His appeal to the President was rejected by a letter of 17 May 2000, but that letter apparently did not reach him and he timely

appealed to the internal Appeals Committee. After he had filed his appeal to the Committee, another copy of the President's letter of 17 May was sent and duly received by him.

4. The Administration has consistently maintained that the transfer was not a disciplinary measure, but was decided in the interests of the Organisation for three reasons: firstly, the complainant's ongoing inability to clear a backlog of work was creating a serious work-flow problem, and while he was reportedly suffering from stress and RSI, the prospect of a swift recovery was uncertain; secondly, the Medical Officer had allegedly recommended that he be transferred to a post with less stressful duties; and thirdly, a complete breakdown in communication had occurred between the complainant and two of his supervisors. The Appeals Committee held hearings at which the complainant and one of his supervisors, as well as other witnesses were heard. The following is the essence of its findings:

"30. [...] In view of the differing statements, the Committee cannot see any reason to suppose that, by ordering his transfer without following the appointed procedure, the director had intended to subject the appellant to a disciplinary measure. His explanation that the decision to transfer the appellant had been taken purely and simply to eliminate the backlog in SEQL (independently of the question of possible disciplinary action against the appellant) has convinced the Committee. The decision cannot therefore be attacked as representing a veiled disciplinary action, regardless of whether it was perceived as such by the appellant.

3. Circumstances surrounding the transfer.

31. [...] In so far as the appellant objects to the way in which the decision to transfer him was taken, the appeal must be allowed in the following respects.

(a) Failure to hear the appellant

32. As already stated, the Committee does not consider that the decision to transfer the appellant amounted to a veiled disciplinary action. However, it had a similarly serious effect on him. Particular importance is therefore attached to the question of whether the appellant was informed to the extent required and in good time, and given the opportunity to comment, from the point of view of the right to be heard, as laid down in Article 93(5) [of the Service Regulations] for disciplinary proceedings. The Committee concludes that this was not taken into account in the transfer procedure in question.

33. The appellant was not heard before the decision to transfer him was issued. He thus had no opportunity to defend himself against the allegations about his performance or, for example, to provide information about the expected duration of his absence. The decision was taken in a great hurry following a telephone call with the Personnel department and without clarifying the medical findings with the [Medical Officer]. The director 1.2.12 requested the appellant's transfer on 29 June 1999, and the proposal to transfer him was distributed to the members of the Working Group 'Staff Matters' on the same day, following consultation with the staff directly concerned. The decision was taken on 11 July, and on 14 July it was forwarded (without explanation) to the appellant and displayed on the noticeboard. All this took place without the appellant being advised in advance, without a possible contact person being approached, without consultation of the [Medical Officer] (eg by telephone), and without any attempt to contact the appellant by telephone. The first discussion with the appellant did not take place until 25 August 1999.

34. The need to act quickly cannot be submitted as justification for such a course of action. Even if there were enough indications that the date of his return to work was not foreseeable, this was no reason not to safeguard the appellant's interests by failing to hear him. It has already been stated that the serious problems which clearly existed in the SEQL unit are not the answer to the question as to whether interim, and for the appellant less drastic, measures would have been conceivable. At the very least, the appellant should have been informed in good time that alternative solutions were not considered feasible. He should have been given the opportunity to comment on this and other issues, such as how long his sick leave was expected to last.

(b) Display on noticeboard

35. The Office does not deny that the decision to transfer the appellant was posted on the Receiving Section noticeboard before the appellant knew about it. [The Director] has apologised for this. However, it will be taken into account when it comes to assessing the severity of the adverse effect on the appellant and determining

appropriate damages.

(c) Treatment of the appellant's personal possessions

36. The appellant was right to be particularly hurt by the fact that his office was immediately occupied by another member of staff and that his personal possessions were packed in boxes and removed from the room. The fact that the removal cases were not located, despite the appellant having asked about them, until the day before the hearing in the present case, that is more than three years later, on the 24th floor of the EPO building, speaks for itself. The request made in the [e-mail] dated 2 July 1999, which read 'Do not touch any personal belongings', was obviously not heeded. The Committee is of the opinion that this course of events, which must have been depressing for the appellant, will also have to be taken into account for the purpose of assessing the amount of the moral damages to be awarded."

5. The Committee concluded that the complainant should receive an award of damages, which, however, it did not quantify and recommended to allow the appeal to the extent set out in its opinion. The President rejected both the Committee's recommendation and the appeal by a letter of 13 January 2003 in which he upheld his earlier decision of 17 May 2002.

6. The complainant takes issue with the Committee's finding that the transfer was not a veiled disciplinary measure. He also contests its other findings of fact as to the situation in the workplace although he admits that a transfer properly carried out "might have been appropriate, even beneficial to him". For its part, the EPO criticises the Committee's view that Article 93(5) of the Service Regulations was applicable notwithstanding its express finding that the transfer was not disciplinary in nature.

7. The complainant has failed to show that the Committee committed any tangible and overriding error in its fact-finding task. It had based its conclusions on its interpretation of the evidence before it, an interpretation which was reasonably open to it. In those circumstances, the Tribunal will not interfere.

8. As far as concerns the EPO, it too has failed to show that the President had any valid reason for rejecting the recommendations of the Appeals Committee, which had heard the witnesses and made specific findings of fact. There has been no showing that those findings were wrong.

9. As for the EPO's argument relating to Article 93(5), it ought not to be considered since it was not mentioned in the impugned decision. Along with the obligation for an international organisation to give reasons when the executive head decides not to follow the recommendation of its internal appeal body (see Judgments 2092 and 2261), it has the duty in its pleadings before the Tribunal not to rely on new and different reasons which it failed to invoke in the impugned decision.

10. The argument is also substantively of little merit. While there can be no doubt that the Committee was wrong to invoke disciplinary procedures when it had expressly found that the transfer was not disciplinary in nature, a careful reading of the quoted paragraphs shows that the mention of disciplinary procedures was only by way of analogy and that there were a number of other serious grounds on which the Committee relied to find that the Administration had treated the complainant badly. In particular, it criticised the precipitate haste with which the transfer was made, the failure to consult the complainant in any way, the public and insulting manner in which it was announced, and the careless treatment of his personal belongings. All of those factors were quite enough, taken together, to support and justify the recommendation that the complainant should receive compensation for the moral injury done to him.

11. The complainant seeks 40,000 euros in damages. Before the Appeals Committee, he sought slightly more than half that amount. In the Tribunal's view, he will be adequately compensated by an award of 10,000 euros together with costs of 1,500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.

2. The EPO is ordered to pay the complainant 10,000 euros in damages and 1,500 euros in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 14 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 19 July 2004.