

**118th Session**

**Judgment No. 3370**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. J. against the European Patent Organisation (EPO) on 7 June 2010, the EPO's reply of 27 September, the complainant's rejoinder of 3 December 2010, the EPO's surrejoinder of 14 March 2011, the complainant's additional submissions of 20 May and the EPO's final comments of 20 July 2011;

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 and the pleadings may be summed up as follows:

A. The complainant joined the EPO at its branch in The Hague in March 1990 as a Programmer at grade B5. In September 1998 he was promoted to grade B6. At the material time he was assigned to the Development and Maintenance Administrative Services Directorate (DAMA-A) within the Principal Directorate Information Systems. On 18 March 2005 the EPO published vacancy note INT/EXT/4075 for the post of Data Warehouse (DWH) Developer in DAMA-A, at grade A4/A1, in The Hague. The complainant applied for this post in April 2005 and was interviewed in August 2005.

On 24 March 2006 the complainant's supervisor submitted an official request for the reclassification of the complainant's post to grade A4/A1, stating that "[t]he changing and increasing demands in DWH-related projects necessitate[d] a general increase in DWH staffing in DAMA-A and an upgrade of the single DWH development and consulting position of DAMA-A, up to now a B6/B4 position, to an A-level". He added that the complainant, who had until then held that position, had been performing for the last two years "real A-level duties, e.g. [...] managing several A-level contractors and performing high-level technical analysis [...] for which he ha[d] proven to have the right technical and managerial skills". In April 2006 the complainant's direct superior, Mr M., and the Principal Director of Information Systems were informed that the Controlling Office insisted that the DWH Developer post be filled in Munich and that it would agree to "de-block" it on that condition.

On 10 May 2006 the complainant enquired about the status of his application for vacancy INT/EXT/4075. He was informed that the delay in the selection procedure was due to discussions between the Principal Directorate Information Systems and the Controlling Office regarding the "de-blocking" of the post in the budget. On 12 September and again on 2 October 2007 he sought clarification on the budgetary allocation of the post he was occupying. On 3 October 2007 he was informed by Mr C., the Director of Personnel, that he had been put temporarily on an A4/A1 post but that he could not derive from that any entitlement for his grading. He was also informed that same day by Mr J., a Human Resources Manager, that the post of DWH Developer would not be filled and that the recruitment procedure for vacancy INT/EXT/4075 had therefore been closed. A post with essentially the same duties was subsequently advertised in Munich through vacancy note INT/EXT/4318.

On 22 October 2007 the complainant requested information on the decision to close the recruitment procedure and clarification on the status of the A4/A1-grade post to which he had been assigned. He was advised on 14 November 2007 that the decision to close the recruitment procedure had been taken by the competent authority and

that, although he was temporarily paid from an A-level post in the budget, he could not draw any right from this.

On 19 December 2007 the complainant wrote to the President of the EPO requesting an acting allowance for having performed A-level duties for the last six to seven years and promotion to an A4/A1-grade post, in accordance with Articles 12(4) and 49 of the Service Regulations for Permanent Employees of the EPO (hereinafter the Service Regulations). He also claimed moral damages and costs. He asked that his letter be treated as an internal appeal in the event that his requests were not granted. In February 2008 the President referred the matter to the Internal Appeals Committee (IAC).

On 1 August 2009 the complainant was reassigned to a B6/B4-grade post in the budget. The IAC issued its opinion on 18 January 2010. It unanimously recommended that the appeal be dismissed as irreceivable in part and unfounded in its entirety. It recommended that the complainant be paid 200 euros for the length of the internal appeal proceedings. By letter of 12 March 2010 the complainant was informed of the President's decision to endorse the IAC's recommendations. That is the impugned decision.

B. The complainant submits that, although he performed A-level duties during the whole period from 2000 until the end of 2007 or, at the very least, during the period from March 2004 until the end of 2007, the EPO refused to pay him the acting allowance for performing the duties of a higher-grade post, thereby violating Article 12(4) of the Service Regulations. He adds that his performance of A-level duties during the above-mentioned period is evidenced by a comparison of his duties with those of the A4/A1-grade post advertised in vacancy note INT/EXT/4075. He maintains that he fulfilled all conditions for an acting allowance under Article 12(4) and that the EPO unacceptably introduced additional conditions for its award not stipulated in the text of that provision. Similarly, he fulfilled all conditions of Article 49(1) of the Service Regulations for promotion to an A-category post.

The complainant reproaches the EPO for acting in bad faith, neglecting its duty of care towards him and contravening his legitimate expectation of selection to the post of DWH Developer or promotion to an A-category post. He argues in this connection that during the whole period of the recruitment procedure for vacancy INT/EXT/4075 and until October 2007, he was deliberately led to believe that the procedure could result in his appointment to an A4/A1-grade post. He adds that after his return from sick leave in 2006, the EPO deliberately and without explanation prevented him from resuming all of his managerial tasks, even though it was previously agreed that they would be assigned to someone else temporarily and only for the period of his sick leave. He maintains that he was the only internal candidate who had the technical knowledge and the motivation for performing the tasks of said post – he was already performing them at the time of his application – as well as his director's full support for promotion to an A-category post. He considers that the EPO profited from his performance of A-level duties under tight deadlines and often during overtime, while only paying him B-level remuneration. In his opinion, the EPO has not sufficiently explained why a vacant post, which was properly advertised at The Hague, was cancelled and a new one with the same duties was then opened in Munich, or why one of his former trainees, i.e. someone less experienced than himself, was selected for that post, despite his declared willingness to move to Munich. This he perceives as a clear attack on his dignity. He submits that by undermining his trust and legitimate expectation, the EPO caused harm to his well-being and to his health.

The complainant asks the Tribunal to quash the impugned decision and to order the EPO to pay him, under Article 12(4) of the Service Regulations, an acting allowance for the period from 2000 to 2007 or, subsidiarily, for the period from 2004 to 2007, together with arrears and interest at the rate of 8 per cent per annum. He also asks the Tribunal to order the EPO to promote him to an A-category position, in accordance with Article 49(1) of the Service Regulations. He seeks moral and punitive damages and costs.

C. In its reply the EPO argues that the complainant failed to request an acting allowance under Article 12(4) of the Service Regulations in good time, and hence his claim in that respect is receivable *ratione temporis* only for the three months preceding the filing of his internal appeal. In addition, the complainant's representative waived during the internal appeal proceedings any claim to an acting allowance for the period from 2001 to 2005 – he only maintained the complainant's claims in that respect for the period following the publication of vacancy note INT/EXT/4075, i.e. 18 March 2005 – and therefore any such claim for the period before 2005 is beyond the scope of the internal appeal and thus irreceivable. Moreover, as the EPO never intended to assign A-category duties to the complainant, his claims for an acting allowance and a promotion, respectively under Articles 12(4) and 49(1) of the Service Regulations, lack substance to the extent that they are based on a temporary budgetary operation.

On the merits, the EPO explains that it temporarily placed the complainant on an A-category post for strictly budgetary purposes and that it never intended to assign to him A-category duties, except if he succeeded in the competition for vacancy INT/EXT/4075. However, in anticipation that he would actually succeed in that competition, he was assigned to a budgetary post in the A4/A1 grade group. It contends that the evidence put forward by the complainant in his attempt to prove that he performed A-level functions is “by no means significant, relevant or conclusive” and that, in any event, he may not obtain retroactive benefits from his alleged performance of A-category duties. It asserts that the complainant did not fulfil the conditions for the payment of an acting allowance under Article 12(4) – it relies in this regard on the Tribunal's ruling in Judgment 2563 – or the conditions for access to a higher grade under Article 49(1).

The EPO rejects the allegations of bad faith and breach of its duty of care towards the complainant. It explains that by placing the complainant on an A-category position, it actually ensured the continuity of his employment. It emphasises that the complainant was generally kept informed throughout the recruitment procedure and also that he was informed without delay of the decision to cancel it. It

notes that, contrary to his contention, there was no “deliberate reduction” of his tasks but that he was simply returned to a B6/B4-grade post in the budget, which corresponded to his actual grade and duties. It asserts its right to review a budgetary situation that was no longer justified. According to the EPO, there was no breach of the complainant’s legitimate expectation, not only because the decision to cancel the recruitment procedure for vacancy INT/EXT/4075 for lack of suitable candidates was taken by the Administration in the proper exercise of its discretion, but also because the complainant did not meet the requirements for access to an A-category post and therefore had no legitimate expectation but a mere hope of being selected for the post of DWH Developer. It rejects the claims for damages and costs as being without merit and it notes with regard to the claim for punitive damages, in particular, that the complainant has not established a deliberate attempt by the EPO to circumvent the Service Regulations. It thus invites the Tribunal to dismiss the complaint as irreceivable in part and unfounded in its entirety.

D. In his rejoinder the complainant submits that the complaint is receivable in its entirety. He points out that Article 12(4) of the Service Regulations does not contain any time limit for requesting an acting allowance. In fact, it does not even foresee a request by the staff member concerned, but merely stipulates that such allowance is paid as from the third month of such temporary duties. It is thus irrelevant for present purposes whether or not he actually requested to receive the acting allowance.

He denies that part of his claim under Article 12(4) was abandoned during the internal appeal proceedings and he produces in this regard an affidavit by his former representative attesting to the contrary. He also produces an e-mail in which the latter asks the Chairman of the IAC to correct the relevant error in the IAC opinion. He maintains that, in any case, it is clear from his internal appeal that his claim under Article 12(4) refers to the whole period during which he continuously assumed A-level duties, namely from 2000 to the end of 2007.

However, in the event that the Tribunal endorses the EPO's position on the receivability of his claim for an acting allowance under Article 12(4), he seeks payment of said allowance from 18 March 2005, the date of publication of vacancy note INT/EXT/4075 or, alternatively, from 1 April 2005, the date of his application for said vacancy, until the end of 2007. He otherwise maintains his claims.

E. In its surrejoinder the EPO maintains its position on the receivability and the merits of the complainant's claims. It expresses surprise at the content of the affidavit signed by the complainant's former representative, especially in view of the latter's acceptance of the explanation provided by the IAC Chairman that there was no indication in the IAC file that the withdrawal of the complainant's claim for an acting allowance for the period prior to 2005 was subject to conditions.

F. In his additional submissions the complainant strongly denies the alleged acceptance by his former representative of the IAC Chairman's explanation.

G. In its final comments the EPO indicates its wish to leave the evaluation of the affidavit signed by the complainant's former representative to the Tribunal's appreciation.

#### CONSIDERATIONS

1. The complainant joined the EPO in 1990 in a position graded B5, step 4, located in The Hague. In 1998 he was promoted to grade B6, step 6. In 2004-2005 the complainant held the position of Area Coordinator of the Data Warehouse Technical Competence Centre. On 1 April 2005 he applied for an A-grade position (INT/EXT/4075). This position was advertised as based in The Hague and had the title of "Data Warehouse Developer in DAMA-A in Principal Directorate Information Systems". The complainant was interviewed in August 2005. During the interview he was asked whether he would be prepared to work in Munich. The complainant

heard nothing further formally about his application, though on 19 May 2006 the complainant's direct superior, Mr M., forwarded to him an e-mail exchange between senior EPO management that had taken place in April 2006, which revealed there was an issue within the EPO about whether the position for which the complainant had applied should be filled in Munich. There was also a discussion in the e-mail exchange about whether there was support for the upgrading of the complainant's position in The Hague.

2. In fact, an upgrade of the complainant's position to A-grade had been requested by Mr M. on 24 March 2006. In the written request, Mr M. said: "Since about two years [the complainant] is performing real A level duties". This is consistent with an opinion expressed by Mr M. in the complainant's staff report covering the period January 2004 to December 2005 and signed in April 2006. In that report Mr M. noted that at the beginning of the reporting period, the complainant's role had changed to a managerial role and, in supplementary comments, he said the following of the complainant: "This proven engagement combined with his profound professional experience and proven qualifications and achievements in his new managerial role qualify him to be promoted to a suitable A-level post."

3. It was against this background that the complainant sent an e-mail to Mr C., the Director of Personnel, on 2 October 2007 requesting an answer to a question he had posed in an earlier e-mail of 12 September 2007, namely that in view of the fact that he had had no answer to his application for the advertised A-grade position, "which post [was he] currently occupying in the office budget?" Mr C.'s response of 3 October 2007 was that the complainant had been "temporarily put on an A1/4 post" but that he could not "derive any entitlement from this for [his] own grading". The complainant pursued the matter further and on 14 November 2007 he received a letter in response to a communication of his dated 22 October 2007. The letter of 14 November 2007 from Mr J., a Human Resources Manager,

informed him that while he was “temporarily paid from an A-category post [...] no right [could] be drawn from this”. In speaking of an A-category post Mr C. was alluding to the fact that the source of the funds used to pay the complainant, at least for the period to which the 2006 budget applied and probably also for the period to which the 2007 budget applied, were funds attributable or allocated, in budgetary terms, to a position of that grade.

4. In due course an A-grade post was advertised and based in Munich and filled by an individual who had been a trainee of the complainant.

5. In his internal appeal initiated by a letter to the President dated 19 December 2007, the complainant said that the letters just referred to (from Mr C. and Mr J.) constituted a decision that negatively affected him. That observation was preceded by two relevant comments. The first was that if, as a B6 employee, he was being paid from the resources allocated to an A-category post, his own B6 post “[had] been suppressed”. The second was that if in fact he was in an A-grade post, he should benefit from an adjustment of status. He added that if he was to carry out the tasks and occupy an A-grade post indefinitely, he should have been, in due course, considered for a promotion in accordance with Articles 4 and/or 49 of the Service Regulations. In addition, he said, he was entitled to the allowance provided for by Article 12(4) of the Service Regulations.

6. The internal appeal was heard by the IAC, which published its report on 18 January 2010. It recommended the complainant’s appeal be dismissed as inadmissible in part and unfounded in all other respects. These recommendations were accepted by the Director of Regulations and Change Management who, in a letter dated 12 March 2010, rejected the appeal as irreceivable in part and unfounded in its entirety. This is the impugned decision. However the complainant was told he would be awarded compensation in the sum of 200 euros for

the delay in the internal appeal process. The pleas of the parties appear to have proceeded on the assumption that this decision can be taken to have been a decision of the President of the EPO.

7. The complainant filed his complaint in this Tribunal on 7 June 2010. The relief he seeks is that the decision of 12 March 2010 be quashed. He also seeks an acting allowance under Article 12(4) of the Service Regulations, including arrears and interest at 8 per cent per annum for the period 2000–2007 or, alternatively, for the period 2004–2007. Additionally, he seeks “promotion to an A-grade position under Article 49” as well as moral and punitive damages plus costs.

8. There are several aspects of the complainant’s claims that can be dealt with briefly. The first is the relief sought by the complainant that he be promoted. It is well settled in judgments of the Tribunal that it will not order the promotion or reclassification of a staff member, as such decisions are discretionary and involve specialist evaluation (see, for example, Judgment 2706, consideration 14). This aspect of his claim should be rejected.

9. The second concerns the complainant’s claim that, by order of the Tribunal, he be paid the allowance payable under Article 12(4) of the Service Regulations from either 2000, 2004 or 2005 to 2007. For reasons which will emerge shortly, it is unnecessary to deal with an issue addressed at length by both the complainant and the EPO, namely whether during the internal appeal the complainant abandoned a claim for payment of this allowance for any period between 2001 and 2005. Nor is it necessary to deal with an argument advanced by the EPO that the claim for payment of this allowance for any period before October 2007 was time-barred and thus irreceivable.

10. It should be noted that Article 12(4) was amended in 2007 by Administrative Council decision CA/D 19/07 of 29 June 2007. The form the provision took until June 2007 was considered by the Tribunal in Judgment 2563. The Tribunal observed that it was obvious

the underlying purpose of the provision was to allow the duties of a person occupying an existing post to be carried out temporarily when a permanent employee in the post was unable to do the job (consideration 9). The Tribunal further noted that an essential prerequisite to the exercise of the power to temporarily assign a person to a higher post was that the post existed and had an incumbent permanent employee at the time of the temporary assignment (consideration 11). Plainly the circumstances of the complainant never involved temporary assignment to a post held by another person. Accordingly, Article 12(4) had no application to the complainant, certainly for the period until its amendment in 2007.

11. In this amended form, the provision read, in part:

“A permanent employee may be called upon to perform temporarily the duties of a post, including the duties of a newly created post, in a higher grade on a full-time basis.”

Whatever may be the reach of this provision in its amended form, it is tolerably clear that the expression “may be called upon” is a reference to a request made of an employee by the administration to perform duties of a post not being her or his ordinary post but a post at a higher grade. In the present case, at best for the complainant, he was performing duties at a higher grade *de facto* and not as a result of a request by the administration of the type just discussed. Accordingly, at no time was the complainant in a situation where he was entitled to payment under Article 12(4). This aspect of his claim should be rejected.

12. This leads to a consideration of the complainant’s claim that the EPO breached its duty of care to him, acted in bad faith and contravened the complainant’s legitimate expectations. Two matters should be noted. In its reply the EPO conceded that “the Office had expected the complainant to obtain [the position for which the complainant applied on 1 April 2005] on the basis of the selection procedure”. The EPO also conceded that in the light of this expectation the complainant’s budgetary post “had already been

transferred to a budgetary position in the A4/A1 group of grades”. As to the reason why the selection procedure was terminated, the EPO submitted in its reply that it was the “candidates’ lack of suitability” and, in support of this argument, referred to paragraphs of the complainant’s brief. However this contention is not supported by what is said by the complainant, and the EPO has provided no material justifying this conclusion. To the contrary, it is tolerably clear that the selection process was abandoned in late 2007 because of a dispute within the EPO as to whether the position initially advertised as based in The Hague (INT/EXT/4075) and for which the complainant applied should in fact have been based in Munich.

13. The Tribunal is satisfied that the EPO breached its duty of care to the complainant. He applied, in good faith, for an A-grade position located in the city in which he then worked and, it may be inferred, also lived. He did so in circumstances in which his direct superior held the opinion that the complainant was worthy of promotion to an A-grade post and had, in fact, for the two years preceding March 2006, been performing duties of the character equivalent to A-grade. Indeed there is no material provided by the EPO to suggest that this assessment was wrong. Comments made in the e-mail exchange of April 2006 referred to above suggest that Mr M.’s opinion was shared by others.

14. It can be inferred that the March 2006 request to upgrade the complainant’s post was an entirely reasonable and appropriate attempt by Mr M. to bring about a result favourable to the complainant and consistent with Mr M.’s opinion of him in the face of the delays and difficulties attending the filling of the position for which the complainant had applied almost a year earlier. While the complainant was not legally entitled to have his post upgraded nor was he legally entitled to be appointed to the position for which he had applied, he was entitled to have the Organisation act in good faith towards him and respect his dignity. It was an affront to his dignity to be exposed to a delay of over two years to resolve his status in circumstances

where he believed, and more importantly where he knew his immediate superior also believed, he had been performing duties of an A-grade post and was suitable for appointment to such a post. This affront to his dignity was exacerbated by the effect his work had on his health. There is evidence from the complainant, not disputed by the EPO, that in early 2006 he felt overworked and had clear physical symptoms and in June 2006 his health deteriorated to a point where he was off work for two weeks.

15. The complainant is entitled to moral damages for this breach of the EPO's duty to him and they are assessed by the Tribunal in the sum of 15,000 euros. While he was represented by a legally qualified colleague, he is nonetheless entitled to 1,500 euros by way of costs.

16. The complainant requested a hearing at which he would call evidence designed to establish that he performed work at an A-grade level. In view of the approach taken by the Tribunal to his pleas, such evidence would not have assisted the Tribunal in its deliberations. Accordingly this request is refused.

#### DECISION

For the above reasons,

1. The EPO shall pay the complainant 15,000 euros as moral damages.
2. It shall also pay him 1,500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO  
MICHAEL F. MOORE  
HUGH A. RAWLINS  
DRAŽEN PETROVIĆ