

**C.**

**v.**

**EPO**

(Application for execution)

**130th Session**

**Judgment No. 4315**

THE ADMINISTRATIVE TRIBUNAL,

Considering the application for execution of Judgment 3962 filed by Ms J. C. on 12 October 2018, the reply of the European Patent Organisation (EPO) of 21 January 2019, the complainant's rejoinder of 6 May and the EPO's surrejoinder of 26 August 2019;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal;

Having examined the written submissions;

#### CONSIDERATIONS

1. The Tribunal delivered Judgment 3962 in public on 24 January 2018. The complainant was substantially successful. She has since applied, on 12 October 2018, for execution of the judgment.

2. At the time of the facts leading to Judgment 3962, Article 52 of the Service Regulations for permanent employees of the European Patent Office provided that a permanent employee who proved incompetent in the performance of her or his duties could be dismissed, but that the appointing authority could instead offer to classify the employee concerned in a lower grade and to assign her or him to a post corresponding to this new grade. After a series of staff reports in which the complainant's overall rating went from "less than good" to "unsatisfactory", a procedure was initiated to determine

whether she should be dismissed on the basis of that provision or perhaps even on disciplinary grounds. This procedure culminated in a decision of the President, on 7 January 2015, to assign her to a post in a lower grade under Article 52. The complainant, who had been working as an examiner at grade A3, which corresponded to grade G12 in job group 4 under the new classification and grading system introduced on 1 January 2015, was placed in grade G7, step 1, and assigned to a post in job group 5. Although the complainant avoided dismissal, this was a substantial drop in grade which almost halved her net salary. In addition, she was required to complete a probationary period in her new post. In a review of the decision of 7 January 2015, the President decided the request for review was unfounded and so informed the complainant on 15 May 2015. This was the decision impugned in those proceedings.

3. In Judgment 3962, the Tribunal held that the President's decision was unlawful in several respects. Firstly, the complainant was not a new recruit and could not be subjected again to a probationary period. Secondly, the President had not based his decision on the assessment required by Article 52(1) of the Service Regulations. Thirdly, there had been no offer of a post to the complainant, as required by that provision. In the result, the decision was set aside and the matter was remitted to the EPO "to undertake the evaluation provided for in Article 52 [...], as explained in considerations 14 and 15 [of the judgment]". The complainant was awarded moral damages and costs, but all other claims, including her claims for reinstatement in her previous grade and job group and for material damages, were dismissed.

4. The actual orders made in Judgment 3962 were:

- “1. The impugned decision of 15 May 2015 is set aside.
2. The matter is remitted to the EPO to undertake the evaluation provided for in Article 52 of the Service Regulations, as explained in considerations 14 and 15 [...].
3. The EPO shall pay the complainant 30,000 euros as moral damages.
4. The EPO shall pay the complainant 8,000 euros as costs.
5. All other claims are dismissed.”

5. Considerations 14 and 15 gave content to order 2 and said:

“14. In the President’s decision in the letter of 7 January 2015 he rejected the approach of the Disciplinary Committee and its recommendation based on the approach. Of some significance is that on 1 January 2015 a new classification and grading system was introduced by the EPO. Thus it was not possible for the President to give effect, literally, to the recommendation of the Disciplinary Committee even if he was minded to do so. But nonetheless the legal question was not whether the reclassification of the complainant under Article 52(1) was a proportionate or disproportionate disciplinary measure. The legal question was whether an appropriate lower grade could be identified into which the complainant would be classified and ultimately the assignment of the complainant to a post corresponding to this new grade. That process plainly involved the identification of an appropriate post. Obviously the identification of the grade, the reclassification and the identification of a post and assignment to it would depend on a number of factors. They would include the skills and qualifications of the complainant notwithstanding that they did not then render the complainant competent to perform the work of an examiner at grade A3. Also relevant would be an assessment of the level of competency of the complainant which would inform the decision about the grade in which the complainant should be classified. The level of the competency would influence or even determine the extent to which the complainant was reduced in grade. Similar considerations would bear upon the identification of a post in the new grade to which the complainant could be assigned. The President did not undertake an exercise with this legal framework in focus even if, as a practical matter, some or perhaps even all these considerations were in play. This is a legal flaw in the impugned decision.

15. A third and related issue arising from the language of Article 52(1) is that once this assessment is undertaken by or on behalf of the President, an offer should have been made to the complainant identifying the new lower grade and the post to which she might be assigned. It was not. Reasonably clearly this step of making an offer is intended to ensure that a permanent employee proven to be incompetent in the position she or he then held, has the opportunity of discussing with the EPO what work she or he might do within the EPO into the future. In the ordinary course, one would expect that a decision to offer to classify the permanent employee in a lower grade and assign her or him to a new post would be significantly more attractive to the staff member concerned, found to be incompetent, than a decision to dismiss. Nonetheless important considerations may arise for the affected staff member including alterations to remuneration and likely career paths within the EPO. Indeed it is not possible to entirely discount, once an offer was made, negotiations or at least discussions taking place between the affected staff member and the EPO about what the EPO proposed. In a case such as the present where mental health issues were involved, some form of agreed medical assessment might also be appropriate to gauge competency given that the underlying aim of this process is to place the affected permanent employee in a position where she or he is competent and contributing to the overall work of the EPO.”

6. The submissions of the complainant in this application for execution are 69 pages long and her rejoinder, 64 pages. They traverse many matters of detail. At the forefront of the relief she seeks in this application is a declaration that she should be at grade G12, step 2, which, on her account, would be the grade and step she would occupy but for the fact that she had been “unlawfully downgraded”. She also seeks, in substance, an order that the Organisation take five steps entailing the evaluation contemplated by Article 52. She also seeks 5,000 euros per month moral damages for past non-execution of the judgment and 7,500 euros per month for any period of future non-execution, and 100,000 euros punitive damages. She also appears to seek material damages effectively being the difference between what she would have been paid by way of salary had she not been downgraded and what in fact she was paid.

7. The granting of this relief assumes two things are established. The first is that the Tribunal accepted in Judgment 3962 that the complainant should be treated as still occupying the position she held before she was downgraded. The Tribunal did not and dismissed her claim for reinstatement.

8. The second is that steps taken by the EPO since the publication of Judgment 3962 do not constitute compliance with it. In assessing whether this contention is correct, the Tribunal cannot ignore the fact that, within the Organisation, much had been done to consider the complainant’s competencies and where she might work and at what grade before the impugned decision was made. While order 2 required the EPO to undertake the evaluation provided for in Article 52, and considerations 14 and 15 could be taken to be an explanation about how the evaluation could occur, the Organisation was entitled to call in aid the circumstances referred to in the second sentence of this consideration. This was not a case where an organisation first confronted and dealt with a staff member who was believed to be incompetent. Some latitude should be afforded the EPO in choosing the appropriate steps to comply with Judgment 3962.

9. The evidence shows the EPO took steps necessary to give effect to Judgment 3962. There is one possible qualification to this statement, which concerns whether an offer was made so as to create an opportunity for a dialogue as discussed in consideration 15 of that judgment. The complainant argues that no offer with these characteristics

was made. The EPO says it made an offer by letter dated 25 April 2018, sent on 26 April 2018. However, while that letter speaks of “offer” it did not constitute an offer of a position but rather was a communication to the complainant to inform her of a “deci[sion] to reassign” her.

10. The question arises whether this was a material failure to execute the Tribunal’s judgment that would warrant further orders being made. Firstly, and while this is disputed by the complainant, it appears from all the documentation before the Tribunal that discussions did occur with the complainant about her qualifications, skills and competencies before the letter of 25 April 2018 was sent on 26 April 2018. In fact the complainant was given a copy of the job specification of the position to which she was assigned by the letter, at a meeting on 25 April 2018.

11. The complainant’s reaction was then not to raise any of the specific issues referred to in consideration 15 of Judgment 3962 and invite reconsideration of the reassignment decision, but rather to seek a formal management review. Her arguments in support of the review contained several elements. One was a legal argument that she was, having regard to Judgment 3962, entitled to be a Patent Examiner. This argument is wrong but appears to have sustained another and consequential argument, namely there could be no reassignment if the complainant remained a Patent Examiner. The complainant does, in yet another argument, advert to the need for the EPO to have made her an offer but she does not suggest specific matters then needed to be discussed, of the type referred to in consideration 15. The complainant’s attitude, as reflected in this request for management review and more generally, was entirely legalistic and did not manifest a desire to engage in non-confrontational dialogue. There is a basis to conclude that the complainant did not want to work together with the EPO in good faith to execute the judgment, as is required by the Tribunal’s case law (see, for example, Judgment 3823, consideration 4). In these circumstances, the EPO’s failure to make an offer as contemplated by Article 52(1) and discussed in consideration 15 was not material. It can readily be inferred that the complainant did not want to engage in such discussions and the EPO was entitled to proceed on the basis that this was the position.

12. In the result, the application for execution should be dismissed.

DECISION

For the above reasons,

The application for execution is dismissed.

In witness of this judgment, adopted on 9 July 2020, Mr Patrick Frydman, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 24 July 2020 by video recording posted on the Tribunal's Internet page.

PATRICK FRYDMAN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ