

107th Session

Judgment No. 2819

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr B. H. against the European Patent Organisation (EPO) on 14 February 2008 and corrected on 23 April, the Organisation's reply of 8 August, the complainant's rejoinder of 15 October 2008 and the EPO's surrejoinder of 27 January 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. The complainant, a Swedish national born in 1948, joined the European Patent Office – the EPO's secretariat – in 1980. He was appointed Principal Director at grade A6 in October 1999. Having become the head of the Joint Cluster Computers which was set up in Directorate-General 1 (DG1) in October 2003, he exercised supervision over some 300 staff members. In January 2005 a new Vice-President took office in DG1. As the complainant's new line manager, the Vice-President expressed his dissatisfaction with his management of the Joint Cluster Computers at several meetings

held in 2005. By a letter dated 1 December 2005 he informed the complainant that the possibility of transferring him to a “grade A6 Principal Director post with special duties” was being examined. A job description of the proposed post was attached to the letter. The complainant responded on 20 December, stating that he had not requested such transfer. He drew attention to the positive developments in the Joint Cluster Computers over the past year and expressed doubts as to whether the tasks set out in the job description for the proposed post matched those of a Principal Director. On 22 December 2005 he was notified of the decision to transfer him “in the interests of the service” to the post of Principal Director with special duties, at grade A6, with effect from 1 January 2006. In an e-mail of 9 January 2006 the Vice-President advised all Principal Directors in DG1 of the complainant’s transfer. He explained that his “misgivings [had grown] as regards the management and the overall performance of the [Joint] Cluster Computers”, and that he had thus decided to release the complainant from his duties as head of the Joint Cluster Computers and to entrust him with special duties within DG1.

The complainant lodged an appeal against that decision with the then President of the Office, who referred it to the Internal Appeals Committee. In its opinion dated 13 September 2007, the Committee unanimously found that the transfer *per se* was justified in the interests of the Office. The majority found that the complainant’s reputation had nevertheless been damaged, in particular because “[t]he nature of [his] duties [...] from January 2006 onwards, and the conditions in which he had to carry out the tasks required to fulfil those duties [...] ma[de] his activities [...] in the new post appear inferior and inconsistent with his official status”. The majority recommended that the complainant be paid moral damages of at least 40,000 euros and assigned to duties consistent with his grade, either in the post of Principal Director with special duties or in another post. Contrary to the majority opinion, the minority saw no reasons for considering that the complainant’s tasks following his transfer were not of the same level as those undertaken by Principal Directors. Thus, it noted that the tasks given to him were of “very high level” and of “significant importance”.

By a letter which he received on 26 November 2007, the complainant was informed that the President agreed with the unanimous opinion of the Committee that the transfer was fully justified but did not endorse the opinion of the majority as to the alleged damage to his reputation. In her view, the appointing authority was entitled to assign the complainant to duties which differed from his previous duties but which remained within the scope of those set out in the job description adopted by the Administrative Council for grade A6 posts. She therefore rejected the appeal as unfounded in its entirety, indicating that she was willing to consider the possibility of improving his administrative support “as a sign of good will”. That is the impugned decision.

B. The complainant submits that since January 2006 he has been employed in a post inconsistent with his grade and status. He relies on the Tribunal’s case law in contending that he was entitled to be assigned duties corresponding to the job description adopted by the Administrative Council for grade A6 posts, according to which the duties of a Principal Director include “run[ning] a prominent organisational unit covering several specialised fields”, “developing the authoritative guidelines for the unit and taking decisions in particularly difficult and important cases”. Yet, following his transfer, his tasks have been limited to analysing, drafting and reporting. He no longer has any staff under his responsibility nor any decision-making authority, both of which are core elements characterising a grade A6 post. The complainant notes that the tasks indicated in the job description of 1 December 2005 have never been assigned to any other staff member holding grade A6 as his or her sole responsibilities, and he submits that the Organisation overstepped the limits of the discretion it enjoys to define the tasks associated with a specific post. He asserts that his duties are so far below his grade that the decision to transfer him constitutes a *de facto* demotion and amounts to a “punishment”.

The complainant views the circumstances of his transfer and the treatment he has received since then as a lasting affront to his dignity. In particular, the fact that on 9 January 2006 the Vice-President sent an

e-mail to all Principal Directors in DG1 conveying a personal view of his performance, which was neither necessary nor substantiated, damaged his professional reputation. He adds that the Internal Appeals Committee failed to take into account the devastating effect of the transfer on his chances of finding other employment consistent with his status.

The complainant asks the Tribunal to order that his assignment to the post of Principal Director with special duties be set aside and that he be reassigned to a post consistent with his grade. He claims compensation in an amount equivalent to 50 per cent of his basic salary from 1 January 2006 until the date of his reassignment to another post and moral damages in the amount of 20,000 euros, plus 25 per cent of his basic salary from 1 December 2007 until the date of his reassignment to another post. He also claims 8,712 euros in costs.

C. In its reply the EPO emphasises that, according to Article 12 of the Service Regulations for Permanent Employees of the European Patent Office, the appointing authority has wide discretion to transfer staff. It points out that the case law establishes that, when an organisation's interests differ from those of a staff member, the former carry greater weight, and it argues that in the present case its interests justified relieving the complainant of his duties. The decision challenged by the complainant does not constitute a disciplinary measure but a mere transfer against his wishes. It did not affect the complainant's salary and it was based on concrete reasons, particularly the fact that his overall performance had failed to meet expectations and that his line manager had lost confidence in him.

The Organisation indicates that, even though the complainant was transferred to a different post, his duties are at the level of a Principal Director and match his experience and qualifications. It notes in this respect that the post of Principal Director with special duties was allowed by the Administrative Council, and that it was designed for tasks other than the management of a prominent organisational unit. It also notes that the complainant remains fully embedded in the Principal Directorate structure, participates in its meetings and is informed, like the other Principal Directors, of meeting agendas,

working papers and reports. Furthermore, he was assured that appropriate administrative support could be made available to him upon request and he has been assigned additional duties since January 2008. The defendant contends that the complainant can be considered as a high-level consultant who has no managerial responsibilities or formal decision-making authority but who can influence decisions and policies.

As to the circumstances of the transfer, the EPO states that the situation of the Joint Cluster Computers was the subject of several meetings held with the complainant in 2005, and that his right to be heard was duly observed. The e-mail of 9 January 2006 did not damage the complainant's dignity; it merely indicated in general terms the justification for his transfer and it was sent to a restricted number of Principal Directors in DG1.

The defendant asks the Tribunal to reject the complainant's claims as unfounded. Should the Tribunal nevertheless consider that the complainant is entitled to compensation, the EPO submits that the amounts he claims are excessive.

D. In his rejoinder the complainant states that he does not question the discretion of the appointing authority under Article 12 of the Service Regulations. He points out that the post he was assigned to had been created originally for political reasons. He also argues that none of the reasons put forward by the Organisation to justify his transfer is concrete or objective. On the contrary, the decision to transfer him was based on his line manager's subjective and unsupported appraisal of his performance. He claims that the additional duties assigned to him as from January 2008 were a mere alibi, and that this is confirmed by his line manager's attitude in practice. He points out that he has been excluded from meetings to which all other Principal Directors in DG1 were invited on a rotational basis and he disputes the contention that he is fully embedded in the Principal Directorate structure.

He presses his claim for moral damages, accusing his line manager of bad faith and abuse of authority, and he asks the Tribunal to

consider the length of the internal appeal proceedings which, in his view, increased the injury he suffered.

E. In its surrejoinder the EPO maintains its position. It rejects the complainant's accusations of bad faith and abuse of authority and asserts that it fulfilled its obligation to make appropriate administrative support available. It adds that it complied with all relevant deadlines and that the internal appeal proceedings were conducted with due diligence.

CONSIDERATIONS

1. The complainant is a senior staff member of the European Patent Office and has held the position of Principal Director, at grade A6, since 1 October 1999. He was appointed head of the Joint Cluster Computers when it was first set up in October 2003 and held that position until 31 December 2005. In that position, he had supervisory and managerial responsibility for approximately 300 staff members. A new Vice-President took over as the complainant's line manager on 1 January 2005. Differences soon developed between them and, on 1 December 2005, the Vice-President informed him that it was proposed to transfer him to a vacant post as Principal Director with special duties at the same grade. The letter set out the duties of the post and attached a proposed job description. The complainant replied on 20 December stating that, as he had not asked for the transfer, he saw no reason to comment extensively on the post. However, he expressed doubt as to "whether the listed tasks [were] actually within the frame of the job description for a Principal Director". He was informed on 22 December 2005 that it had been decided to transfer him to the vacant post "in the interests of the service" with effect from 1 January 2006. He has held that post ever since.

2. One other matter should be mentioned. On 9 January 2006 the Vice-President informed all Principal Directors within his Directorate, by e-mail, that in the course of 2005, his misgivings had grown "in particular as regards the management and the overall

performance of the [Joint] Cluster Computers” and that, after “intense discussions”, including with the Vice-President in charge of Administration, he had “decided to release [the complainant] from his tasks as head of the [Joint] Cluster Compute[rs] and to entrust him with special tasks within [his] Directorate”.

3. The complainant initiated an internal appeal with respect to the transfer decision of 22 December 2005. In its opinion of 13 September 2007, the Internal Appeals Committee was unanimously of the view that the transfer decision, itself, was legally sound and should not be quashed. A majority of the Committee was of the view that the duties of the post to which the complainant had been transferred “differ[ed] to such an extent from the [...] duties of a Principal Director [...] that [his] job was no longer consistent with his grade”. In the result, the majority recommended that the complainant be assigned to employment consistent with his A6 grade, that he be paid at least 40,000 euros by way of moral damages and two-thirds of his substantiated costs, but that his appeal be dismissed in other respects.

4. The complainant was informed by an undated letter received by him on 26 November 2007 that the President of the Office had rejected his appeal in its entirety “for the reasons put forward by the Office during the appeal proceedings and in accordance with the minority opinion of the Committee”. That is the decision impugned by the complaint by which the complainant seeks the quashing of the transfer decision of 22 December 2005, reassignment to a post consistent with his A6 grade, compensation amounting to 50 per cent of his basic salary from 1 January 2006 until reassigned, moral damages of 20,000 euros plus 25 per cent of basic salary from 1 December 2007 until reassigned, and costs.

5. The complainant acknowledges in his rejoinder that the “decisive question” is whether his present post corresponds to his A6 grade. It is not disputed that the post does not conform to the

definition contained in the Service Regulations which relevantly specifies as follows:

“The Officer’s duties require extensive proven professional experience which enables him to supervise an extensive technical or legal/administrative field of work on the basis of an education at university level.

[...]

The Officer runs a prominent organisational unit covering several specialised fields or is chairman of a Board of Appeal.

The duties primarily consist of developing the authoritative guidelines for the unit and taking decisions in particularly difficult and important cases.”

So far as concerns the definition, it is not disputed that, in his present post, the complainant has no supervisory functions – indeed, he has no staff at all – does not run a prominent organisational unit, is not a chairman of a Board of Appeal and has no formal decision-making authority.

6. It is also not disputed that the post presently occupied by the complainant was initially created for a particular person in the context of the adherence of a contracting State. That being so, the fact of its existence does not warrant a conclusion that there are tasks appropriate to grade A6 that do not involve any supervisory, managerial or decision-making functions. Moreover, the tasks that are presently attached to the post are new tasks formulated by the Vice-President in the context of the complainant’s transfer. Those tasks are:

- “(i) The drawing up, revision and standardisation of guidelines, internal instructions and similar rules on the work of patent examiners.
- (ii) The drafting of proposals for decisions on cross-site harmonisation of DG1 activities.
- (iii) The drafting of proposals for improving the cluster structures, in consultation with the Principal Directors responsible in each case.
- (iv) The revision of training programmes for new recruits [...] and the development of ideas for further training [...] in close co-operation with DG2.
- (v) Providing support to Vice President 1.
- (vi) The performance of other individual tasks.”

7. The minority of the Internal Appeals Committee was of the view, and the EPO argues, that the individual tasks that have been given to him “can be considered as being of the same level as several tasks which are dealt with by the existing [Principal Director] Teams” and are of “a very high level” and “of very significant importance”. The minority also noted that the complainant participates in all Principal Director meetings and his experience, qualifications and hierarchical level are essential to the success of his special duties. The last two considerations are not relevant to whether the complainant’s duties are those of a grade A6 post. And the fact that his tasks are of the same level as several tasks carried out by Principal Director teams does not alter the fact that he carries out none of the functions assigned to a grade A6 post by the Service Regulations, namely, supervision, the running of a prominent organisational unit, the development of authoritative guidelines and the taking of decisions in important and difficult cases.

8. It is well settled that a transfer decision, if of a non-disciplinary nature, “must show due regard, in both form and substance, for the dignity of the official concerned, particularly by providing him with work of the same level as that which he performed in his previous post and matching his qualifications” (see Judgment 2229, under 3(a)). Given that the new tasks of the complainant involve none of the tasks specified in the Service Regulations for a grade A6 post, it must be concluded that the transfer did not respect his dignity. There are two other matters that indicate a lack of respect for the complainant’s dignity. First, there is the Vice-President’s e-mail of 9 January 2006 that was transmitted to all other Principal Directors in his Directorate and that clearly impugned the complainant’s ability to perform his functions as head of the Joint Cluster Computers. The EPO contends that “[t]he information was provided in a formal and delicate manner and was restricted to the absolute minimum necessary to justify the decision taken among the higher management of the Directorate-General”. There was no need to justify the decision to the complainant’s peers and the e-mail could only lessen his standing in their eyes. The second matter is that the

complainant was not provided with any staff – not even a secretary. Only in the impugned decision and, then only “as a sign of goodwill” is it said that the President was prepared to reconsider “the possibilities of improving [his] administrative support”.

9. The EPO further argues, in accordance with the opinion of the minority of the Internal Appeals Committee, that the grounds that justified the complainant’s transfer, namely, “the performance of the Joint Cluster Computers, the doubts of the [Vice-President] as to how the cluster had been managed and the resulting lack of confidence” also justify his placement “in a substantially different [...] post [...] which does not entail management of a prominent organisational unit”. The argument must be rejected. Undoubtedly, the Vice-President developed a lack of confidence as to the complainant’s management of the Joint Cluster Computers. However, the complainant had worked as Principal Director in another unit from 1 October 1999 until October 2003 and, as the majority of the Internal Appeals Committee pointed out, there had been a “complete lack of criticism, at least until October 2004, of [his] performance as Principal Director”. At the most, the evidence, including the oral evidence of the Vice-President in the internal appeal proceedings, indicates only dissatisfaction with the complainant’s management of the Joint Cluster Computers, not his inability to manage a joint cluster. As was stated by the majority of the Internal Appeals Committee, that conclusion “would require proof of more fundamental deficiencies, going beyond the criticisms levelled by [the Vice-President]”.

10. As the transfer decision did not respect the complainant’s dignity, the Tribunal will order that the complainant be reassigned, within 28 days, to a post that satisfies the core requirement of a grade A6 post, namely, the running of a prominent organisational unit covering several specialised fields, and that the decision of 22 December 2005 be quashed with effect from the date of his reassignment to the new post.

11. Although the complainant's dignity has been seriously injured, and consistently injured over a period of three and a half years, he has suffered no financial loss and his claims for compensation and for moral damages are excessive. The assessment of moral damages by the majority of the Internal Appeals Committee is also excessive. The complainant will be adequately compensated by an award of moral damages in the amount of 25,000 euros. There will be an award of costs of these proceedings and the internal appeal proceedings in the amount of 5,000 euros.

DECISION

For the above reasons,

1. The decision of the President of the Office rejecting the complainant's internal appeal is set aside and the decision of 22 December 2005 is set aside with effect from the date on which the complainant is reassigned to a new post in accordance with point 2 hereof.
2. The President shall, within 28 days, reassign the complainant to a grade A6 post that involves the running of a prominent organisational unit covering several specialised fields.
3. The EPO shall pay the complainant moral damages in the amount of 25,000 euros and costs of these proceedings and the internal appeal proceedings in the amount of 5,000 euros.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 14 May 2009, Mr Seydou Ba, President of the Tribunal, Ms Mary G. Gaudron, Vice-President, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Mary G. Gaudron
Dolores M. Hansen
Catherine Comtet