

Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

M.
v.
EPO

129th Session

Judgment No. 4266

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. M. against the European Patent Organisation (EPO) on 25 March 2013, corrected on 27 June, the EPO's reply of 9 October 2013, the complainant's rejoinder of 13 January 2014 and the EPO's surrejoinder of 23 April 2014;

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

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the rejection of his requests for a transfer.

The complainant joined the European Patent Office, the secretariat of the EPO, in 1982 as an examiner in The Hague. On 1 March 2002 he was appointed to a director post in Berlin. Following the publication, in August 2008, of a vacancy notice for six posts at the director level, three of which were located in The Hague, the complainant submitted an application specifying that, due to his family circumstances, he wanted to be transferred back to The Hague and, in particular, to a director's post in the Vehicles and General Technology Cluster. The positions advertised were to be filled by internal competition or by transfer.

On 27 October 2008 the complainant informed the Vice-President of Directorate-General 1 (DG1) in Berlin – who was the chairman of the Selection Board appointed for that vacancy notice – of the reasons motivating his request for a transfer. He explained that his spouse had returned to The Hague because of the racial discrimination she had experienced in Berlin, and that the resulting strain on their family life was seriously affecting both his and his spouse’s health. In its report dated 16 November 2008, the Selection Board decided not to support the complainant’s request for a transfer due to the fact that he was close to retirement age. The members were of the opinion that, as the directorate to which he would be transferred had been without a director for a long time, it was necessary to re-establish stability within the directorate, and that this would not be achieved by transferring the complainant, who would soon retire.

After he informally learnt that his request for a transfer would not be granted, the complainant sent an email to the President of the Office on 20 November 2008 expressing his disappointment as to the way his formal and informal requests for transfer had been handled and explaining in detail his particular circumstances. He requested that the President exercise her power to transfer him to an appropriate post in The Hague. On 25 November 2008 the President replied that she had asked the Vice-President of DG1 to “discuss the whole business with [him]”.

On 27 November the complainant sent a second email to the President contesting the reasons that had been given to him over the phone by the Vice-President of DG1 to justify the refusal of his request for a transfer. He asserted that insufficient weight had been given to his personal situation and he reiterated his request to be appointed to an appropriate post in The Hague. He added that this communication should be considered as an internal appeal should the President decide not to grant his request.

By email dated 10 December 2008, the Principal Director of Human Resources, in response to the complainant’s emails of 20 and 27 November, provided explanations as to the denial of his request. The complainant replied on the same day, formally requesting written

confirmation of the reasons underpinning the recommendation of the Selection Board. He reiterated this request on 24 December 2008.

In an email of 23 January 2009 the Principal Director of Human Resources transmitted to the complainant the reasons for the Selection Board's refusal to support his request for a transfer. The complainant's appeal was referred to the Internal Appeals Committee (IAC) on 27 January 2009 as case RI/183/08.

On 5 February 2009 he lodged a second internal appeal, referring to the email of 23 January 2009. Alleging discrimination on the basis of age, he contended that the selection procedure was legally flawed and claimed 2,000 euros in damages for every working day in Berlin after 1 January 2009. He was informed in April 2009 that his second internal appeal was referred to the IAC as case RI/19/09.

The complainant retired at the age of 65 on 1 June 2011. In October 2012, after having held an oral hearing, the IAC rendered its opinion concerning both his internal appeals. A majority of its members found that the Office had not discharged its duty of care towards the complainant, who was therefore entitled to moral damages. According to the majority, the Office had not done enough to help the complainant in his particularly difficult situation. The minority, on the other hand, considered that as long as the private interests of the staff member and those of the Office were weighed honestly, there was no flaw in the discretionary decision-making process if the Office's interests prevailed.

By a letter of 20 December 2012, which is the impugned decision, the Vice-President of Directorate-General 4 (DG4) decided, by delegation of power from the President, to dismiss the complainant's second appeal as irreceivable insofar as it was directed against the reasons provided to justify his non-selection, which were within the scope of his initial claims. Furthermore, the first internal appeal was dismissed as unfounded in its entirety. In accordance with the minority opinion, the Vice-President of DG4 considered that the way in which the Office's interests had been weighed in the context of the selection procedure could not be criticised. He added that the Office was nevertheless prepared to award the complainant 2,500 euros "on an *ex gratia basis*, without acceptance of any liability or obligation on the part of the Office and only for the final

and full amicable closure of the present cases”. This offer was declined by the complainant.

The complainant asks the Tribunal to quash the impugned decision and to award him punitive damages of 2,000 euros for every day that he was “forced to work” in Berlin as of 1 January 2009. He also claims costs as well as further and other relief as appropriate.

The EPO asks the Tribunal to dismiss the complaint as unfounded on the merits.

CONSIDERATIONS

1. The complainant joined the EPO in 1982 as an examiner in The Hague. In March 2002, he was appointed to a director post in Berlin. In July 2002, as a result of the multiple “racially motivated incidents” the complainant’s spouse suffered in Berlin, she and their children returned to live in the Netherlands. In 2005, the complainant expressed his wish to be transferred back to The Hague for family reasons. By 2007, the complainant’s health was deteriorating due to what the complainant described as his “split family life” and his repeated expressions of interest in being transferred to The Hague that never materialized.

2. In 2008, the complainant submitted two requests for transfer from the EPO’s Berlin office to its office in The Hague. The complainant lodged separate internal appeals, RI/183/08 and RI/19/09, against the rejections of his transfer requests.

3. For reasons that will become evident, it is necessary to clarify the subject matter of the decision challenged in each appeal. Vacancy Notice TAI/4631 (vacancy notice) dated 14 August 2008 with a closing date of 15 September 2008 announced six vacant A5 director posts, three in Munich and three in The Hague (vacant director posts). The notice stated that the “posts [would be] filled by appointment as a result of an internal competition or by transfer”. The notice asked applicants to state “their preferred post and site” and to provide a “motivation statement”. The complainant, the incumbent of an A5 director post, submitted an

application for “a transfer [...] to a Director’s post in The Hague, in particular for a transfer to such a post in the Cluster Vehicles and General Technology”. The complainant noted that he had been in Berlin since March 2002 and that “the reason for [his] request lie[d] in [his] family circumstances”.

4. On 27 October 2008, the complainant had occasion to speak to the Vice-President of DG1, the chairman of the Selection Board for the vacancy notice, about his request for transfer to The Hague. During their conversation, the complainant explained the reasons for his request including his and his spouse’s health issues and problems arising from having to live apart for such an extended period of time.

5. On 19 November, the complainant learned informally that his request for a transfer would not be granted. On 20 November, the complainant sent an email to the President in which he expressed his disappointment at having to learn from a colleague that a decision had been taken about his transfer and that based on a reading of the minutes of the VPC1’s meeting the previous week it became clear to him that he would not be transferred. The complainant expressed his disappointment and dissatisfaction with the way he was treated and added that based on the limited information he had been given, he failed to see a solid reason for not transferring him at that time. In the final paragraph of the email, the complainant stated: “Dear [President], I herewith request that you use your power as President of the EPO and appeal to you to transfer me to an appropriate post in The Hague.”

6. Subsequently, in a 27 November 2008 email to the President, the complainant noted that he had received a telephone call that morning from the Vice-President of DG1, the chairman of the Selection Board, during which the Vice-President had explained the Selection Board’s reasons for not supporting the complainant’s application for transfer to one of the vacant director posts. The complainant stated that he did not wish at that point to detail the Vice-President’s arguments, however, in his view the stance of the Selection Board was “technocratic.” Relevantly, the complainant stated that he was prepared to discuss the matter with

the President but in the “meantime, [he] wish[ed] to reiterate [his 20 November] request to [the President] in [her] specific authority and to soon appoint [him] at an appropriate post in The Hague”. The complainant added that if the President did not grant his request, his email should be taken as an appeal in accordance with Article 108 of the Service Regulations for permanent employees of the European Patent Office. On 27 January 2009 the Director of the Employment Law Directorate notified the complainant of the President’s decision to reject the appeal he had lodged on 27 November and to refer the appeal to the IAC for an opinion as case RI/183/08.

7. In the meantime, in December 2008 the complainant made two requests for written confirmation of the reasons for refusing his request for a transfer to a vacant director post in The Hague provided by the Vice-President of DG1 on 27 November 2008. In a 23 January 2009 email to the complainant in response to these requests, the Principal Director of Human Resources informed the complainant that after further consultation with the Vice-President of DG1 he could confirm the reasons he was given on 27 November and set out those reasons in the email. On 5 February 2009, the complainant sent an email to the President in which he took issue with the reasons for the refusal of his request for a transfer to a vacant director post. The complainant stated that in his opinion the selection procedure was legally flawed and that the President’s decision to appoint candidates based on the Selection Board’s report was unlawful. The complainant added that the email should be taken as an appeal in accordance with Article 108 of the Service Regulations.

8. On 5 April 2009, the Director of the Employment Law Directorate informed the complainant that, regarding the internal appeal he had lodged on 5 February 2009 against the rejection of his transfer request to The Hague, the President had come to the conclusion that the procedure was correctly applied and had referred the case to the IAC for an opinion as case RI/19/09.

9. At this juncture, some observations are necessary. Based on a review of the record and the EPO’s pleadings in the present complaint, it is evident that the Administration considered that the complainant’s

RI/19/09 appeal was a challenge to the same decision the complainant had challenged in appeal RI/183/08 and, thus, only one decision was at issue. This position is not supported by the record. It is true that the complainant challenged the decision rejecting his request for a transfer in relation to the vacancy notice in his 5 February 2009 internal appeal (RI/19/09). However, there is nothing in the content of the complainant's 27 November email to the President that can be taken to be a challenge to the decision not to transfer the complainant to one of the vacant director posts identified in the vacancy notice. Rather, in his 27 November email, knowing that his application for a transfer made in response to the vacancy notice was rejected and considering his personal circumstances, the complainant reiterated a separate and broader request to the President for a transfer to any appropriate post in The Hague.

10. Returning to the internal appeals, as provided in Article 10(2) of the Rules of Procedure of the IAC, the IAC combined the complainant's two appeals and delivered a single opinion for the President's consideration. In its opinion, the IAC dealt with the receivability of both appeals and found that they were receivable. The IAC unanimously concluded that the appeals were unfounded. As well, a majority of the panel members found that the EPO had acted in breach of its duty of care and recommended that the complainant be awarded moral damages in an amount equal to one month's basic salary.

11. On 20 December 2012, the Vice-President of DG4 informed the complainant that "after careful consideration of the opinion of the [IAC] in cases RI/183/08 and 19/09 concerning procedure TAI/4631, [he had] decided, by the delegation of power from the President, to reject [the complainant's] appeal as irreceivable in part and unfounded in its entirety." The Vice-President of DG4 elaborated stating:

"More specifically, your appeal R1/19/09 is considered irreceivable in so far as it turns against the reasons requested for the non-selection decision. Th[is] reasoning was requested and provided in the context of your earlier appeal RI/183/08. The reasoning provided remained in the scope of your initial claims and did not constitute a new appealable decision."

The Vice-President of DG4 added that the reasons given to the complainant applied to all three posts in The Hague announced in the vacancy notice; the complainant's personal situation was taken into account by the Selection Board; and the weighing of the Office's interests in the selection procedure could not be criticized. The Vice-President of DG4 decided that there had been no breach of the EPO's duty of care. Relevantly, the Vice-President noted that "[the complainant's] appeals were directed against the procedure TAI/4631" and, therefore, the subsequent steps taken by the Administration regarding his personal situation were separate from the selection procedure and had no bearing on the lawfulness of the procedure.

12. This decision is problematic for a number of reasons. First, it is evident that the Vice-President considered that appeals RI/183/08 and RI/19/09 were directed at the same decision arising from the selection procedure for the vacant director posts announced in the vacancy notice. As explained above, this was not the decision challenged in appeal RI/183/08. As a result, the Vice-President did not consider the merits of the decision the complainant in fact challenged in that appeal or make a final decision in relation to that decision. Second, the Vice-President's decision that appeal RI/19/09 was irreceivable because it challenged the same reasons that were provided in relation to the decision in appeal RI/183/08 is unfounded. In this regard, the IAC observed that in appeal RI/19/09 the complainant clearly challenged the President's decision on the ground that it was based on a flawed selection procedure and concluded that the appeal was receivable. The Tribunal accepts the IAC's reasoning and finds that the internal means of redress have been exhausted and the present complaint is receivable.

13. Returning to internal appeal RI/183/08, as noted above, the IAC and, in turn, the Vice-President of DG4 did not consider the merits of the complainant's appeal against the President's decision not to transfer him to an appropriate director post in The Hague, but that failure is not challenged in these proceedings.

14. At this point, before turning to the parties' submissions concerning the selection procedure, it is convenient to set out the Selection Board's reason, subsequently adopted by the President, for not supporting the complainant's application for a transfer. Regarding the complainant's application, the Selection Board's 16 November 2008 report to the President states:

“The transfer of [the complainant] is not supported by the Board because of the fact that the directorate to which [the complainant] would be transferred has already been quite long without a director and the expected stay of [the complainant] in this directorate – in view of his age (62) – is considered to be too short to re-establish stability within the directorate.”

15. The complainant submits that the selection procedure to fill the posts in The Hague mentioned in the vacancy notice is flawed for two reasons. First, the complainant submits that he applied for a transfer to any one of the three posts in The Hague. However, the Selection Board only considered his candidature for the director post in the Vehicles and General Technology Cluster and overlooked his applications for the other two director posts in the Civil Engineering and Thermodynamics Cluster and the Electronics Cluster. The EPO disputes the complainant's submission. The EPO contends that the reason given in the Selection Board's report, namely, the need for the continuity of leadership, reflected the Selection Board's conclusion with respect to all three director posts in The Hague. Thus, the complainant's argument that part of his application was overlooked is not borne out by the facts and should be rejected. This contention is unfounded. The reasoning only refers to a single directorate, in particular, “to which [the complainant] would be transferred”; that directorate had been without a director for a long time; and given the complainant's age there would be insufficient time “to re-establish stability within the directorate”. Given that this was the only reason given for the complainant's non-selection for a post in The Hague and there is no evidence in the record from which it could be inferred that the Selection Board considered the complainant's candidacy for all three posts, the Tribunal concludes the Selection Board did not consider the complainant's application for the other two posts. However, in the impugned decision, the Vice-President of DG4 did consider the

complainant's suitability for the three posts. Accordingly, the complainant is not entitled to moral damages in this respect.

16. The second flaw identified by the complainant is the Selection Board's failure to take into account his personal circumstances and its negative consequences for him and his spouse. The material in the pleas does not enable the Tribunal to be affirmatively satisfied that this matter was not taken into account.

17. Lastly, the complainant submits that in view of the fact that the Administration was well aware of his personal circumstances and the possibility of harm to him should he not be transferred, the EPO breached its duty of care by not granting his request for a transfer to The Hague. As the only decision at issue in the present complaint is the complainant's non-selection for one of the vacant director posts in The Hague, his claims regarding the EPO's breach of its duty of care are beyond the scope of the present complaint.

18. In light of the above considerations, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2019, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 10 February 2020.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

DRAŽEN PETROVIĆ