

W. (No. 2)

v.

EPO

131st Session

Judgment No. 4399

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr R. E. W. against the European Patent Organisation (EPO) on 20 September 2013 and corrected on 21 October 2013, the EPO's reply of 27 January 2014, the complainant's rejoinder of 24 March and the EPO's surrejoinder of 2 July 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 decision to transfer him from a manager position to a non-managerial post.

The complainant joined the European Patent Office, the EPO's secretariat, on 1 September 1989. Effective 1 April 2008, he was promoted to the position of Head of Human Resources Vienna in Principal Directorate 4 (PD 4). As a result, he became the line manager and reporting officer of a staff member with whom he was in an intimate relationship (his partner). By letter of 13 June 2008 to the Principal Director Human Resources, the Chairman of the Staff Committee Vienna raised concerns regarding the fact that the complainant would be the direct line manager and reporting officer of his partner. The Office started considering alternatives to move either the complainant or his partner to another position. In the meantime, the complainant

requested to be transferred to the position of Head Post Grant that he had held from 1996 to 2001. In May 2009, the Office opened an internal competition to fill that position, but the complainant was notified in July 2009 that his application was unsuccessful.

During a meeting held on 12 November 2009, the complainant was orally informed that the President of the Office had decided to “reassign” him to the post of Administrator in Principal Directorate 5 (PD 5). On 18 November 2009, the complainant replied to his line manager’s email sent on the same day contesting the fact that the transfer decision was taken unilaterally without any possibility for him to influence it. The complainant’s transfer was confirmed by a letter of 19 November 2009 with the effective date of 1 December 2009. His grade and step remained unchanged.

After his partner’s request for early retirement was approved on 7 December 2009, the complainant contested, by a letter of 8 March 2010, the transfer decision and requested reinstatement in his previous position or alternatively in the position of Head Post Grant that he occupied before becoming Head of Human Resources Vienna.

By letter of 3 May 2010, the complainant was informed that his request was registered with the Internal Appeals Committee (IAC) as the President had come to the conclusion that the relevant rules had been correctly applied. The IAC heard both parties on 3 December 2012 and in its report dated 23 April 2013 found that the Office had failed to comply with essential procedures regarding transfers and unanimously recommended that the main request in the internal appeal be allowed. It recommended that the complainant be transferred back to the position he held until 1 December 2009 and that he be awarded moral damages and reimbursement of his legal counsel’s costs. Regarding the complainant’s claim for compensation for his own time and trouble, the IAC recommended by majority that he be awarded an additional amount of 500 euros, whereas the minority recommended that such compensation be awarded only subject to proof.

In June 2013, both parties agreed to extend the deadline for the EPO to issue a final decision to 24 July 2013 in order to find an amicable settlement. As no decision was taken within this period of time, the complainant filed a complaint with the Tribunal on 20 September 2013 against the implied rejection of his internal appeal. By a letter of 18 November 2013, the Vice-President, Directorate-General 4 (DG4)

decided to reject his internal appeal. He considered that the change of the complainant's duties was deemed necessary due to his personal relationship with one of the staff members, and that the decision was not tainted with any flaw.

The complainant asks the Tribunal to set aside the transfer decision of 19 November 2009 and to award him material damages corresponding to 50 per cent of his basic salary from 1 September 2009 until the date of reinstatement in his previous functions. He requests compensation in the amount of 545,920 euros for the loss of career opportunities resulting from the impossibility to be promoted to the next higher grade. The complainant further seeks moral damages in the amount of 10,000 euros as well as additional moral damages of 2,000 euros for the length of the internal appeal proceedings. The complainant asks to be reimbursed costs for the internal procedure in the amount of 5,580 euros and for the present proceedings in the amount of 1,000 euros with interest on all amounts due.

The EPO requests the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. At the time of the filing of the present complaint, the complainant had not yet received a final decision with regard to the appeal against his 1 December 2009 transfer to Principal Directorate 5 (PD 5). The final decision was subsequently taken by the Vice-President DG4 and notified to the complainant by letter dated 18 November 2013. The present complaint will be regarded as impugning the explicit final decision which the complainant has had the opportunity to address in his rejoinder.

2. In its 23 April 2013 report, the IAC unanimously recommended that the main request in the internal appeal be allowed and, accordingly, to transfer the complainant to the post he held until 1 December 2009; to award him moral damages in the amount of 10,000 euros; to reimburse the costs of the complainant's legal counsel; and to reject the claim for material damages. A majority recommended awarding additional compensation in the amount of 500 euros, though a minority recommended allowing costs (other than attorney costs) on proof. The IAC unanimously

rejected all other claims. It found that the decision to employ the complainant in PD 5 from 1 December 2009 “was a transfer within the meaning of Articles 4 and 12 [of the Service Regulations for permanent employees of the European Patent Office]”. It based this finding on the “unambiguous wording used in the decision” of 19 November 2009, and on the fact that the two posts had two different post numbers in CA/D 1/09 (2010 budget) without any “budget footnote indicating that the [complainant’s] old post [...] [had] been converted into his new one”. The IAC found that this suggested that “no reallocation of tasks between directorates (-general) occurred” and noted that in the oral hearing the Office confirmed “a transfer occurs when a vacant post is filled with a staff member”. In sum, it concluded that the complainant was transferred and as the decision did not comply with essential procedures for transfers, it had to be set aside. Moreover, it found that the Office had failed to fulfil its obligation to consider the complainant’s interests, stating: “... the [complainant’s] interests had to be considered with particular care because it was only the Office’s own decision - taken in full knowledge of his personal circumstances - to promote the [complainant] in 2008 that put him in the position of being his partner’s line manager. The IAC considers the Office’s knowledge of their relationship to be proven, as is confirmed by the Office’s appointment of the [complainant’s] own line manager as reporting officer for both him and his partner following the 2008 restructuring. But if the Office transfers the [complainant] in 2008, in full knowledge of all the circumstances, into the post of head of administration at its Vienna sub-office, and then later finds this situation no longer tenable for other reasons, then it has an even greater obligation to ensure that when resolving the matter it gives full consideration to the interests of all parties involved. It failed to do that in this case.” The IAC noted that the Office also failed to deal with the matter transparently, did not properly consult the complainant and his partner prior to taking the decision nor did it consider the early retirement of the complainant’s partner, in particular considering the partner’s increasing absences for health reasons in late 2009 and early 2010, the Christmas break, and the complainant’s lengthy annual leave planned for the period up to the end of February 2010.

3. In the express final decision dated 18 November 2013, the Vice-President DG4 rejected the complainant's appeal as unfounded in its entirety, stating that "contrary to the Appeals Committee opinion, it is considered that, in view of the specific situation existing due to [the complainant's] personal relationship to one of [his] staff members, a change of [his] duties was deemed justified and necessary". He went on to note that, following the rejection of the complainant's application for another post in Vienna, and due to the complainant's partner's health problems, the Office was unable to "apply any other milder solution" and that the Office "offered [him] the opportunity to express [his] comments on the proposed change of duties before the decision was taken". He concluded that "the [...] decision [of 19 November 2009], being a discretionary one, was taken after due consideration of [the complainant's] interests and all other relevant aspects, but the Office's interest in regularising an abnormal hierarchical relationship had to prevail". He also reasoned that "for the sake of the stability in the department, [the transfer] decision could not be reversed afterwards despite [the complainant's] partner's decision to retire as this would have caused additional administrative uncertainty".

4. The grounds for complaint are as follows:

- (a) the decision of 18 November 2013 was *ultra vires*;
- (b) the transfer decision was based on errors of fact and law and appeared similar to a hidden disciplinary sanction; and
- (c) the Organisation violated the principles of *venire contra factum proprium*, duty of care, respect for the complainant's dignity, and due process.

5. The complainant contests the validity and receivability of the 18 November 2013 decision taken by the Vice-President DG4 on the basis that it breached Articles 6(1) and 9 of the Act of Delegation of 1 November 2008 and that the Vice-President DG4 had a potential conflict of interest. He also asserts that as the deadline had passed for receipt of a final decision, the decision should be considered irreceivable as time-barred. The Tribunal accepts the Organisation's evidence that the Act of Delegation of 1 November 2008 was amended on 19 July 2010 and that the Office followed the amended provisions according to which the power of decision rests with the Vice-President DG4 in all

cases other than those where a unanimous opinion of the IAC is to be followed. The Tribunal finds that there is no evidence of a conflict of interest and also observes that the Vice-President DG4 who suggested the initial transfer was not the same person as the Vice-President DG4 who took the final decision. With regard to the assertion that the decision should be considered time-barred, the Tribunal finds that the fact that the final decision was not taken within the time-limit agreed between the parties does not render it irreceivable in these proceedings.

6. The claim that the transfer decision was based on errors of fact and law is well founded. The 25 September 2009 letter from the Principal Directorate Human Resources to the President, proposing the complainant's transfer from PD 4 to PD 5, included misleading information. Specifically, it stated that the complainant was his partner's line manager without noting that the complainant's partner had been assigned to a different reporting officer. The evidence before the Tribunal shows that the complainant's partner was transferred, as of 31 March 2008, into a different hierarchy "to avoid any potential conflict of interests" while remaining in the same office. This is referenced in paragraph 9 of the complainant's job specification form, dated 6 May 2009, which reads as follows: "[d]ue to the personal relationship between [the complainant] and [his partner], the proposal of [the complainant] that [Director, Human Resources (HR) Line Management Support] act as reporting officer of [the complainant's partner] (see [the complainant's partner's] transfer letter dated 31.03.2008) was implemented in order to avoid any potential conflict of interests" (emphasis added). The EPO has not provided any persuasive evidence to refute the complainant's evidence that the conflict of interest had been remedied by the changes in hierarchy for his partner at the time he was promoted to the post in PD 4. In its reply in the present proceedings, the Organisation stated: "[a]s a consequence of the promotion, the complainant occupied a position that made him the line manager and reporting officer of his partner, with whom he had been in an intimate relationship for a number of years. To alleviate this conflict of interest, it was first agreed that the complainant's line manager, and not the complainant, would be the appointed reporting officer for the complainant's partner." The EPO then referred to an email, dated 27 November 2009, from the Director HR Line Management Support to the complainant in which it is mentioned: "as I we [*sic*] both agreed previously that it was more appropriate for

[Director HR Line Management Support] to be the reporting officer of [the complainant's partner] and not [the complainant] in view of [their] personal circumstances...". This reinforces the complainant's assertion that the situation had already been remedied.

7. With regard to the errors of law, it is important to note that the Service Regulations in force at the relevant time did not include any provisions for "reassignment" as described by the Organisation in its submissions. Thus, as the IAC found, the act must be considered as a transfer in accordance with the provisions of Article 12 of the Service Regulations. Considering this, the IAC correctly concluded that the Office failed to follow the relevant provisions for transferring the complainant from PD 4 to PD 5. Moreover, the creation of a new post in PD 5 and the abolition of a post in PD 4 violated Articles 4(2) and 31 of the Service Regulations as this transfer necessarily entailed the abolition of the complainant's post in PD 4 and the creation of a new post in PD 5 to which he was then transferred, though no announcement was made of the vacant post which had been created or of the complainant's transfer to that post. As such, the staff movement violated the provisions of Article 4(2), which requires that "[t]he staff shall be informed of each vacant post when the appointing authority decides that the post is to be filled". It also violated the provision of Article 31 of the Service Regulations, which provides that "[a]ll specific decisions regarding [...] transfer [...] of a permanent employee shall be communicated to the staff". The complainant submits that the transfer also violated Article 38(3) of the Service Regulations and Article 25(2)(a) of the Financial Regulations of the EPO. However, given that the above-detailed violations of Articles 4 and 12 of the Service Regulations are sufficient to warrant the setting aside of the impugned decision, the Tribunal finds it unnecessary to treat the new arguments regarding Articles 38(3) of the Service Regulations and 25(2)(a) of the Financial Regulations.

8. The arguments that the Organisation violated the principles of *venire contra factum proprium*, duty of care, respect for the complainant's dignity, and due process are founded. It is uncontested that the EPO promoted the complainant to the post of Head of Human Resources Vienna in PD 4, with effect from 1 April 2008, knowing that he was in an intimate relationship with a staff member in that department, thus creating a situation of potential conflict of interest. It is also uncontested

that the EPO had decided to immediately remedy that situation by appointing the complainant's line manager as reporting officer for the complainant's partner, which was communicated to the complainant's partner in a transfer letter dated 31 March 2008. Considering these facts, the IAC observed that the Office did not fulfil its obligation to ensure that the interests of all parties were given full consideration prior to resolving the matter. In particular, the IAC stated that "the way in which [the] Office management dealt with the problem was not transparent" and that neither the complainant, nor his partner, were invited to discuss possible solutions. The IAC went on to state that the Office "failed to take account of the obvious possibility of [the complainant's] partner's early retirement" and that "[t]he Office had an obligation here to [at] least discuss with the two staff members directly affected other (less drastic) ways to solve the problem". The IAC was not convinced by the Office's argument that the unit concerned needed a stable solution. It observed that in the case under review, "it was the Office's duty to tolerate a direct line-manager relationship between the [complainant] and his partner" considering that "the [complainant's] partner was increasingly absent on health grounds in late 2009 and early 2010; the further employment period of the [complainant] would have included the Christmas break; the [complainant] himself had planned lengthy annual leave for the period up to the end of February 2010; and at this stage the situation had already persisted for nearly 1.5 years". These findings reflect a balanced and thoughtful analysis by the IAC, as the primary trier of fact, of the issues raised in the internal appeal and, as such, they merit considerable deference (see Judgment 4180, consideration 7). It is important to reiterate that the complainant's partner had requested early retirement in late November 2009, which was approved on 7 December 2009 with an effective early-retirement date of 1 March 2010.

9. The Tribunal finds that the Organisation knowingly kept the discussions regarding the complainant's possible transfer from him, and the decision was taken before even discussing it with him or his partner. This is evidenced by the 25 September 2009 letter from the Principal Directorate Human Resources to the President in which it is explicitly stated: "once this [transfer] is agreed, [the complainant] can be informed and transferred from [PD 4] to the vacant post [newly created in PD 5]". The handwritten note on the back of that letter, dated 9 November 2009, states: "President accepts the recommendation that [the complainant]

move with his permanent post to [PD] 5". The complainant was not notified of this transfer until the meeting of 12 November 2009 at which he was informed orally that the decision had been taken. Despite the Organisation's arguments to the contrary, that notification cannot be considered as a proper consultation with the complainant prior to the decision being taken.

10. It is not evident why the Organisation decided that it had to hold a competition for the post of Head Post Grant rather than simply filling the vacancy by direct transfer, as allowed by Article 12 of the Service Regulations, if it considered the situation to be in such dire need of remedy, as appears from its submissions. Nor is it explained why the complainant was not successful in that competition despite his having previously occupied the post with success. Moreover, the Organisation has not presented any evidence to show that the complainant was made aware that the Organisation did not consider the situation remedied by its initial acts to remove the complainant's partner from his direct supervision. Thus, it was not unreasonable for the complainant to assume that there was no continued conflict of interest, which needed to be further remedied.

11. The complainant asserts that the responsibilities of the newly created post in PD 5 were not at the same level as those of his PD 4 post, despite the fact that it was classified at the same grade. Specifically, he notes that there were no managerial duties in the new post. This is not refuted in the Organisation's submissions, which are limited in this regard to noting that the new post was of the same grade. That, and the lack of a proper announcement of the vacancy and of his transfer contributed to the injury to his dignity.

12. The complainant claims that the internal appeal procedure was egregiously delayed. The procedure began with the complainant's letter dated 8 March 2010 requesting that the transfer be set aside "for formal and procedural flaws, overlooking of material facts or obviously wrong conclusions which have been drawn from evidence on which the decision was based" and that he be reinstated to his previous post. The Office did not file its position paper on the appeal until 12 January 2012, the IAC presented its opinion on 23 April 2013, and the Office failed to provide the complainant with a final decision by the agreed

upon extended deadline of 24 July 2013. This constituted unreasonable delay in the internal appeal proceedings. The damage to the complainant which this delay occasioned is obvious considering the simplicity of the appeal and the urgency of the need for a remedy regarding the unwanted transfer. The Tribunal will therefore award moral damages on this ground.

13. In light of the above, the decisions communicated by letters dated 19 November 2009 and 18 November 2013 must be set aside. However, considering the time that has elapsed, the Tribunal recognizes that reinstatement of the complainant in his previous functions, as he requested, could raise substantial practical difficulties and therefore the complainant is entitled to full compensation for the material and moral injury he sustained (see Judgment 3282, under 8). As the complainant has not established that his unlawful transfer caused him material injury, he will not be awarded compensation for the loss of career opportunities which he seeks. However, he will be awarded moral damages in the requested amount of 12,000 euros. He will also be awarded costs in the amount of 1,000 euros in these proceedings. His claim for costs in the internal appeal proceedings will be rejected as there are no exceptional circumstances to justify such an award (see Judgment 4217, consideration 12).

DECISION

For the above reasons,

1. The decisions contained in the letters dated 19 November 2009 and 18 November 2013 are set aside.
2. The EPO shall pay the complainant 12,000 euros in moral damages.
3. The EPO shall also pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 25 March 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 14 April 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ