

B. (No. 3)

v.

EPO

133rd Session

Judgment No. 4485

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr I. B. against the European Patent Organisation (EPO) on 5 June 2013, the EPO's reply of 16 September, the complainant's rejoinder of 13 December 2013 and the EPO's surrejoinder of 10 March 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:

Acting in his capacity as a staff representative, the complainant challenges the decision to assign different duties and responsibilities to a Principal Director (PD) without a competitive selection process.

In May 2011 the President of the European Patent Office, the EPO's secretariat, consulted the General Advisory Committee (GAC) on a restructuring of Directorate-General 5 (DG5) which he proposed to implement as of 1 August 2011. At the time, DG5 comprised four Principal Directorates, each of which contained several Directorates. In the new DG5 structure, three of these Principal Directorates (5.1, 5.2 and 5.4) would be re-named and their roles and duties would change. This involved moving some of the existing Directorates from one Principal Directorate to another and consolidating others. In particular, four of the five Directorates of Principal Directorate 5.1 would move to

Principal Directorate 5.4, and one of the three Directorates of Principal Directorate 5.4 would move to Principal Directorate 5.1.

The GAC gave a divided opinion on this proposal. The members appointed by the President were in favour, but those nominated by the Central Staff Committee considered that the implementation of the restructuring should be postponed until 1 January 2012, to allow time for further consultation of the GAC on a revised proposal taking into account their concerns. In the event, the President decided to approve the restructuring as initially proposed with an effective date of 1 September 2011. He published this decision on 21 July 2011.

On 4 August 2011 the Vice-President of DG5 announced that the President had decided to “re-allocate the duties” of three Principal Directors “in line with DG5’s new structure”. PD 5.4 (Mr H.) was to take over the duties of PD 5.1 (Mr F.). The latter would take over the duties of PD 5.4, and Mr v.d.E. would take over the duties of PD 5.2.

Acting in his capacity as a staff representative, the complainant, together with another member of the Munich staff committee, wrote to the Vice-President of DG5 challenging what he described as the decision to “transfer” Mr H. to the post of PD 5.1 without a “bona fide open selection procedure”. He argued that the functions and post descriptions of PD 5.1 and PD 5.4 were entirely different and required different qualifications. Moreover, Mr H., who had been appointed to the post of PD 5.4 on 1 February 2011, had not completed his probation period at the time of his “transfer”, which raised a question as to whether, at the time of his appointment, it had not already been intended to move him to the new post a few months later. The complainant requested that the transfer decision be revoked, failing which his letter was to be treated as an internal appeal.

This request was forwarded to the President, who rejected it and referred the matter to the Appeals Committee. In its opinion of 8 January 2013, the Appeals Committee unanimously held that the reassignment of tasks to Mr H. was “within the limits of what [was] required by the Service Regulations and other applicable rules” and recommended that the appeal be dismissed. The Committee compared the duties and the skills required of PD 5.4 prior to the restructuring with those of PD 5.1 after the restructuring and found that, although there were some differences, they were not so striking as to indicate that the two jobs were obviously not similar.

By a letter of 7 March 2013, the Principal Director of Human Resources informed the complainant that she had decided, by delegation of power from the President, to reject his appeal in accordance with the opinion of the Appeals Committee and for the reasons set out by the Office during the appeal proceedings. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision and likewise the decision to transfer Mr H. from the post of PD 5.4 to that of PD 5.1. He seeks punitive damages or “other measures so as to effectively discourage the Organisation from future abuses of power”, and he also claims costs.

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

CONSIDERATIONS

1. The EPO notes that the complainant filed the present complaint in his capacity as a staff representative, but explicitly states that it does not challenge the receivability of the complaint. In view of the position of the EPO and the fact that, ultimately, the complaint is to be dismissed, the Tribunal will not, itself, examine the receivability of the complaint. However, this should not be taken as a tacit acceptance by the Tribunal that, in a similar case in the future, the complaint will be treated, without question, as receivable.

2. Mr H. joined the EPO on 1 February 2011 in the PD 5.4 post (European Patent Academy and Qualification) after an open selection procedure. Following the reorganization of DG5, which took effect on 1 September 2011, Principal Directorate 5.1 (Patent Information and European Cooperation) was renamed “European and International Cooperation” and was placed under the responsibility of Mr H., who thus became PD 5.1. The complainant, in his capacity as a member of the Staff Committee at the EPO’s headquarters, challenges what he describes as the decision to “transfer” Mr H. to the PD 5.1 post after the reorganization of DG5. The EPO, on the other hand, refers to it as a decision to reallocate the duties of a Principal Director following the reorganization of one of its general directorates: in effect, a reassignment from one Principal Director post to another.

3. In contesting the impugned decision, the complainant states that the essential question is whether the challenged decision constitutes a transfer, as opposed to a rotation or a re-allocation of duties, and which procedural steps must be observed in the case of a transfer. He contends that the decision to appoint Mr H. to the PD 5.1 post was flawed as it was a misuse of the President's authority because it was made without an open selection procedure, which he argues Articles 4(3) and 7(1) of the Service Regulations for permanent employees of the European Patent Office (hereinafter "the Service Regulations") required. He however states that it is not disputed that the Office is entitled to reallocate or to reassign tasks and duties as the needs of the service evolve and that it is not disputed that the Office can rotate staff between equivalent posts, but that the staff representation is opposed to the transfer of Principal Directors and Directors between non-equivalent posts without fair and open selection procedures.

4. Articles 4 and 7 of the Service Regulations in force at the material time relevantly stated as follows:

**"Article 4
Vacant posts**

- (1) Vacant posts shall be filled by the appointing authority, having regard to the qualifications required and ability to perform the duties involved:
 - by transfer within the Office;
 - by appointment to a post corresponding to a higher grade or category as a result of an internal competition, after consulting the Selection Board in accordance with Article 7; or
 - by recruitment and/or appointment as a result of a general competition open both to employees of the Office and to external candidates, in accordance with Article 7.
- (2) The staff shall be informed of each vacant post when the appointing authority decides that the post is to be filled.
- (3) Vacant posts shall be filled in the interests of the proper functioning of the Office and having regard to the need to offer career opportunities to permanent employees. [...]

[...]

**Article 7
Recruitment or appointment procedure**

- (1) Recruitment or appointment shall generally be by way of competition in accordance with the procedure laid down in Annex II. A competition may be held for the purpose of constituting a reserve for future recruitment.

A procedure other than that of competition established in Annex II may be adopted by the appointing authority for the recruitment or appointment of the senior employees referred to in Article 11 of the European Patent Convention [...], for Principal Directors and also, in exceptional cases, for recruitment to posts which require special qualifications.

[...]"

5. It is plain that the exercise which culminated in Mr H.'s assumption of the PD 5.1 post did not create a vacant post within the meaning of Article 4 of the Service Regulations that was to be filled by a competitive procedure. Moreover, it is inescapable, in the Tribunal's view, that Article 7(1) is applicable where there is a recruitment (which in its ordinary and natural meaning is the action of finding new people to join an organization) or where an appointment is made in the circumstances of recruitment. However, that is not what occurred when Mr H. obtained the PD 5.1 post. The challenged decision involved a reallocation of duties (even if the complainant refers to it as a transfer) whereby Mr H. was moved to a roughly equivalent post in a restructured DG5. The reorganized PD 5.1 post in which Mr H. assumed duties included some of the responsibilities he performed in his previous PD 5.4 post and some of the duties and responsibilities from the PD 5.1 post before the restructuring in circumstances which, in the Tribunal's view, accord with the complainant's statement that the Office is entitled to reallocate or to reassign tasks and duties as the needs of the service evolve and that the Office can rotate staff between equivalent posts. Neither Article 7(1) nor any other provision in the Service Regulations required a competitive procedure for this reallocation of duties.

6. Accordingly, the complainant's contention that the decision by which Mr H. filled the reorganized PD 5.1 post was flawed in the absence of a competitive procedure fails. Moreover, as the complainant provides no evidence, as required by the case law, to prove that the challenged decision was based on a misuse of authority (see, for example, Judgment 3193, consideration 9) or to prove that the President exercised his discretion unlawfully under any of the other proscribed heads referred to in consideration 5 of Judgment 4240, the complaint is unfounded and will be dismissed.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 19 October 2021, Mr Michael F. Moore, President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 27 January 2022 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ