

## NINETY-FOURTH SESSION

**Judgment No. 2191**

The Administrative Tribunal,

Considering the complaint filed by Mr F. B. P. M. B. against the European Patent Organisation (EPO) on 2 December 2001 and corrected on 9 January 2002, the EPO's reply of 27 March, the complainant's rejoinder of 1 June and the Organisation's surrejoinder of 27 June 2002;

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

Having considered the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a French national born in 1960, joined the European Patent Office, the EPO's secretariat, in May 1993. He was assigned to the Vienna sub-office. As from May 1994 he worked as an office clerk at grade B1 in personnel administration. In November 1998 his appointment was confirmed and he was promoted to grade B2.

Confirming the substance of a previous conversation, the Head of the Vienna sub-office informed the complainant by a letter of 29 March 2000 of a decision to "loan him in a support capacity" to the CD-ROM Invoicing and Subscription Unit, in the Department of Product Distribution. The complainant asserts that this decision was taken with immediate effect. According to the Organisation, it did not take effect until 3 April.

On 2 April the complainant wrote to the Principal Director of Personnel to complain about the speed of his transfer. The Director replied by e-mail on 8 May. He indicated that according to the information available to him, the transfer had been decided in the interest of the Department and taking into account the complainant's wishes. He offered to meet with the complainant, who accepted his offer. The meeting took place the next day. On that occasion, the complainant voiced the fact that the transfer did not correspond to his wishes and that it had been imposed on him. On 18 May he wrote a letter to the Head of the Vienna sub-office asking to be reinstated in his previous post as soon as possible. The Head of the sub-office, who allegedly informed him on 2 June that he would in fact be transferred on the initiative of the appointing authority, replied on 26 June that she could not grant his request.

On 28 July 2000 the complainant appealed against this decision to the President of the Office. In a letter dated 14 September, the Director of Personnel Development informed him that since the President had not been able to allow his appeal, it had been referred to the Appeals Committee. By a note of 14 December 2000, the Head of the sub-office informed the complainant that his temporary assignment in the Department of Product Distribution was to become permanent with immediate effect.

The Appeals Committee considered that the appeal was receivable. In its opinion dated 3 August 2001, it recommended that the President reject the appeal but suggested that he should examine the possibility of reassigning the complainant. On 5 September 2001 the new Principal Director of Personnel informed the complainant that his appeal had been rejected but that the Office would nevertheless consider reassigning him should this prove to be feasible and in the interest of the Office. That is the impugned decision.

B. The complainant asserts that the transfer was a veiled sanction. In the exercise of his previous duties, he had had to take a stand against his hierarchical superiors, or against people who were "protected" by the Head of the sub-

office, and so the latter had decided to "get rid" of him.

According to the complainant, Article 12 of the Service Regulations provides for a transfer on the initiative of the appointing authority in only one case, namely when it is to a vacant post. However, the post to which he was transferred did not satisfy that requirement. Moreover, he was given no advance notice. The impugned decision was therefore taken in breach of the formal and procedural requirements and was tainted by abuse of authority.

The complainant asserts that the EPO violated the principle of good faith by stating that he would only be "loaned" and never transferred against his will. His superiors equally lied in stating that the transfer corresponded to his wishes; he has no interest in his new duties.

He also denounces the problems of personnel management in the Vienna sub-office and considers that loss of trust in his hierarchical superiors caused him to incur health problems. He points out that the Office has yet to offer him a new job.

The complainant seeks the quashing of the impugned decision, 10,000 euros in moral damages and 1,000 euros in costs.

C. In its reply the EPO explains that as the complainant had been informed of his transfer on 29 March 2000, the appeal he submitted on 28 July was time-barred. The letter of 26 June 2000 merely confirmed the decision of 29 March.

Subsidiarily, the EPO denies that there has been abuse of authority. The complainant's transfer was dictated solely by the interest of the Department, which was to clear a backlog in the processing of orders resulting from the prolonged absence, on medical grounds, of the staff member in charge of them. The EPO considers that it also took the complainant's interest into account by first assigning him to the post on a temporary basis to ensure that he had the ability to perform the tasks it intended to entrust to him.

Although the Organisation acknowledges that the complainant was transferred against his will, it asserts that the Head of the sub-office did not intend to cause him any harm. Relying on the Tribunal's case law, it considers that the allegation of bad faith is unfounded. It submits that the complainant has failed to establish that his hierarchical superiors lied. The Organisation was entitled to effect the disputed transfer and the arguments put forward by the complainant do not call this into question.

According to the EPO, the complainant's temporary assignment to his new post, which later became permanent, complied with the provisions of Article 12 of the Service Regulations. The complainant carried out a temporary replacement from 3 April to 14 December 2001. An urgent assignment of this kind did not require any prior notice. In addition, the complainant's argument that he received no prior notice has no basis in law. Consequently, there was no procedural flaw.

Lastly, the Organisation explains that the link between the reasons for the complainant's transfer and the alleged problems in personnel management seems to be "tenuous".

D. In his rejoinder the complainant points out that the Appeals Committee held that his appeal was receivable. He maintains that the Head of the sub-office wanted to "punish" him by transferring him to a post which had been medically certified as generating "strong psychological tension". Responding to the EPO's allegations that he failed to substantiate his claims, the complainant requests that the Tribunal hear witnesses.

E. In its surrejoinder, the EPO states that it is opposed to the hearing of witnesses. It points out that the post to which the complainant has been transferred presents no danger for the health of its incumbent.

## CONSIDERATIONS

1. By a decision of 29 March 2000 the complainant was assigned temporarily to the Department of Product Distribution. On 26 June his request to be reinstated in his previous post was refused. His temporary assignment became permanent as from 14 December 2000. He considers that his transfer was illegal and tainted by abuse of authority and asks that it be set aside.

The EPO's main plea is that the present complaint is irreceivable. Subsidiarily, it asks the Tribunal to dismiss the complaint as being without merit.

### *Receivability*

2. (a) The decision of 29 March 2000 was not challenged within the three-month time limit as laid down in Article 108(2) of the Service Regulations. Insofar as it challenges the decision of 29 March 2000, the complaint is irreceivable due to the complainant's failure to exhaust the internal means of redress.

(b) The decision of 26 June 2000 was, however, challenged within the prescribed time limit. The internal means of redress have thus been exhausted.

(c) The complainant also challenged the decision of 14 December 2000 before the Appeals Committee. The Committee took the view that the appeal was receivable on that point but concluded that it was devoid of merit. The internal means of redress have thus been exhausted and the Organisation cannot deny this before the Tribunal.

The EPO wrongly asserts that the decision of 26 June 2000 merely confirmed that of 29 March 2000 and therefore cannot set off a new time limit for an internal appeal. The decision of 26 June was in fact a reply to the complainant's letter of 18 May in which he had requested that he be reinstated in his previous post. That decision therefore partly concerned a different issue and was open to appeal.

### *On the merits*

3. (a) The complainant does not dispute the Organisation's right to assign him temporarily to an activity other than that of the post to which he had been appointed. In this case it was necessary to transfer him, as the Appeals Committee confirmed in its opinion, to which reference may be made.

(b) Furthermore, the EPO could have considered, without abusing its discretionary authority, that the circumstances warranting the temporary assignment were still present on 26 June 2000. This decision is beyond reproach.

(c) That is not the case, however, for the decision of 14 December 2000 which stated that the complainant's temporary assignment was to become permanent.

On this issue, the complainant submits that the Organisation violated Article 12 of the Service Regulations. Paragraphs 1 and 2 of Article 12 read as follows:

"(1) The appointing authority shall, acting solely in the interests of the service and without regard to nationality, assign each permanent employee to the specific post for which he has been appointed.

(2) A permanent employee may be transferred within the Office either on the initiative of the appointing authority or at his own request to a vacant post which corresponds to his grade."

The complainant asserts that Article 12 has been violated as the post to which he was transferred was not vacant.

The explanations of the EPO, which denies that the provisions of the article in question have been violated, are not satisfactory. They are not compatible with the wording of the decision of 14 December 2000 assigning the complainant to his new post on a permanent basis.

In this case, the transfer was not possible within the meaning of Article 12, since there was no vacant post. Thus, the Organisation should not have transformed a temporary assignment into a permanent one.

The complainant's interests were disregarded all the more since he was opposed to the transfer. Organisations must carefully take into account the interests and dignity of staff members when effecting such transfers.

Since that violation of the complainant's rights alone warrants the setting aside of the decision of 14 December 2000, and that of 5 September 2001 insofar as it rejects the complainant's appeal, the Tribunal need not examine the plea of abuse of authority. An award of moral damages in favour of the complainant, which the Tribunal sets at 1,000 euros, is also justified.

4. The Tribunal notes that the President of the Office is willing to consider reassigning the complainant should this prove feasible and in the interest of the Office.

5. The complainant's pleas succeed for the most part and he is therefore entitled to 1,000 euros in costs.

## DECISION

For the above reasons,

1. The decision of 14 December 2000 is set aside, as is the decision of 5 September 2001 insofar as it rejects the complainant's appeal.

2. The EPO shall pay the complainant 1,000 euros in moral damages and 1,000 euros in costs.

3. All other claims are dismissed.

In witness of this judgment, adopted on 12 November 2002, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mrs Hildegard Rondón de Sansó, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2003.

*(Signed)*

Michel Gentot

Jean-François Egli

Hildegard Rondón de Sansó

Catherine Comtet