114th Session **Judgment No. 3161**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr M. R. against the European Patent Organisation (EPO) on 29 October 2009 and corrected on 8 December 2009, the EPO's reply of 22 March 2010, the complainant's rejoinder of 22 April and the Organisation's surrejoinder of 29 July 2010;

Considering Articles II, paragraph 5, and VII 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 British national born in 1960, joined the European Patent Office, the EPO's secretariat, on 1 November 1988 as a patent examiner in Directorate-General 1 (DG1) in The Hague (Netherlands). With effect from 1 March 1992 he was transferred to the post of administrator in the International Legal Affairs Department of Directorate-General 5 (DG5) in Munich (Germany), where he performed various functions. In September 2005 DG5 was reorganised and a new Principal Directorate – European and International Affairs – was created (PD5.1). The complainant was

subsequently assigned new duties in the Directorate of European Affairs, Member States, within PD5.1.

In July 2007 the Principal Director of PD5.1 verbally informed the complainant that the Office was considering transferring him to an examiner post. By a letter of 19 December 2007, signed by both the Principal Director of Personnel and the Principal Director of PD5.1, the complainant was again notified of his possible transfer on the basis that his professional skills were predominantly technical and did not correspond to the skills that were needed in the Directorate of European Affairs, Member States. He was asked to provide his feedback on the matter and was assured that, in the event of a transfer, his grade and step and his status as an employee would remain unchanged.

In a letter of 11 February 2008 the complainant expressed his opposition to the proposed transfer to an examiner post but indicated his willingness to move to a post that was commensurate with his knowledge and experience. The following day the complainant's counsel wrote to the Principal Director of Human Resources asserting inter alia that, in light of the complainant's professional experience, placing him in an examiner post would be a breach of the duty of care and loyalty owed to him by the Office. By a letter of 24 April addressed to the complainant, the Principal Director of Human Resources explained that the Office was prepared to take his wishes into account but that no other suitable posts were currently available and there was an urgent need to recruit examiners in DG1. He indicated that the next step in the process should take the form of a conversation between the complainant and representatives of DG1 in order to identify possible technical areas in which the complainant's skills could be utilised.

On 26 June 2008, at a meeting with two directors from the Measuring and Optics Joint Cluster, a staff representative and a member of the Human Resources Principal Directorate, the complainant reiterated his objections to being assigned to an examiner post. By a letter of 16 July to the President of the Office, the complainant's counsel requested inter alia that the complainant not be transferred to

an examiner post in DG1 and that he be allowed to remain in the Department of European Affairs, Member States. In the event that these requests could not be granted, he asked that his letter be treated as an internal appeal.

The complainant was informed by a letter of 12 September 2008 that the President had referred the matter to the Internal Appeals Committee for an opinion. While the internal appeal process was ongoing, by letter of 10 October he was notified of the decision to transfer him, with effect from 1 November 2008, to the post of examiner in Directorate 2.2.13, in accordance with Article 12(2) of the Service Regulations for Permanent Employees of the European Patent Office. By a letter of 15 October the complainant's counsel informed the Internal Appeals Committee that the complainant also sought the setting aside of that decision.

The Committee issued its opinion on 8 June 2009 and recommended inter alia, by a majority, that the complainant's transfer be set aside and that he be redeployed, preferably within PD5.1, to a post commensurate with his experience. A minority of the Committee's members recommended rejecting the appeal. By a letter of 3 August 2009 the complainant was informed that the President had received the Committee's opinion but was seeking his agreement to extend the prescribed time limit for taking a final decision so that she could consider a pending report from the Ombudsman regarding allegations that the complainant had made in connection with his transfer. In an exchange of correspondence with the Administration, the complainant asserted his right to receive a decision from the President within the statutory time limit. Having received no final decision, on 29 October 2009 he filed his complaint with the Tribunal, impugning the decision of 10 October 2008.

By a letter of 9 December 2009 from the Director of Regulations and Change Management, the complainant was informed that the President had decided to follow the minority opinion of the Internal Appeals Committee and, for the reasons expressed therein as well as those put forward by the Office during the internal appeal, to reject his appeal as unfounded in its entirety. He emphasised that the President

disagreed with the finding of the majority of the members of the Committee that the reasons given for the complainant's transfer were not sufficient.

B. The complainant contends that the decision to transfer him to an examiner post violates his status as an employee because it breaches Article 12(2) of the Service Regulations according to which, in his view, a transfer should be made to a vacant post corresponding to the employee's grade. He also disputes the EPO's assertion that he did not possess the necessary skills to discharge his functions in the Directorate of European Affairs, Member States, pointing out that from 1992 until 2000 and from 2005 until his transfer in 2008 he was engaged in international cooperation projects within DG5.

He characterises the Office's contention that his transfer was based, in part, on an urgent need to recruit examiners in DG1 as a "pretext" and accuses the Office of misuse of authority. He submits that for 16 years he pursued a career with the EPO as an administrator and, consequently, he no longer possesses the requisite skills or experience to work as an examiner. Indeed, the Office has had to send him to the European Patent Academy for training, and his learning curve is anticipated to last three years.

According to the complainant, the Office sought to justify his transfer on the grounds that his post was being abolished, yet the 2009 budget for PD5.1 did not provide for the suppression of any posts. On the contrary, the number of permanent posts was increased by three. In addition, he was not a suitable candidate to participate in a job "rotation" because his work in the field of international affairs was not compatible with the core tasks of a patent examiner.

Relying on the Tribunal's case law, the complainant asserts that any transfer must be commensurate with the qualifications of the employee and match the knowledge and skills gained in his previous position. It is not enough to simply grant the employee the same grade. He contends that, although he remained at grade A4, he suffered humiliation because he was treated like a newly recruited examiner with no work experience. Furthermore, his transfer has

deprived him of future promotion opportunities. Consequently, the transfer violated his dignity and good name and caused him unnecessary hardship.

He asks the Tribunal to quash the decision of 10 October 2008 and to order the EPO to reinstate him in his previous post or, in the alternative, to place him in another administrative post within PD5.1 which corresponds to his qualifications, experience and skills. If such a post is not immediately available, he asks to be placed "on loan" to PD5.1 and to be assigned to a suitable vacant post within a reasonable period of time. He also seeks costs.

C. In its reply the EPO recalls that, according to the case law, transfer decisions, being discretionary in nature, are subject to only limited review. It asserts that the disputed decision was lawful as it was taken for a number of complementary reasons, which, when considered together, provide justification for the transfer.

First, the complainant's skills, which were mainly technical, were not suited to the highly political nature of the duties performed in the Directorate of European Affairs, Member States, after the reorganisation of PD5.1. Second, the Office needed additional examiners in DG1 to cope with an increasing workload. Consequently, it transferred former examiners back to that Directorate and also recruited new examiners, some of whom were in the complainant's age group. In its view, based on his previous experience, the complainant was more qualified to perform examination duties than examiners new to the profession. Third, contrary to the complainant's assertion, posts were in fact abolished within PD5.1. Fourth, the defendant explains that it has an interest in pursuing job rotation for certain staff members in order to support career development. The complainant's transfer permits other examiners to benefit from job rotation. Furthermore, the Office explored alternative transfer possibilities for the complainant but no other suitable posts were vacant at the material time.

Referring to the case law, the defendant submits that the decision to transfer the complainant was taken with due respect for his dignity. He was fully informed and given the opportunity to be heard. The

decision was not taken for reasons of professional incompetence, nor was it a hidden disciplinary sanction. The complainant maintained his grade and salary; he stayed in the same duty station, was provided with the necessary training and was entrusted with duties for which he had been recruited and which he had performed for four years. Lastly, the Organisation denies that his chances of promotion have been prejudiced.

D. In his rejoinder the complainant presses his pleas. He contends that there is no link between any of the Office's reasons for his transfer and that it is therefore logical to analyse the lawfulness of each reason separately, in line with the approach taken by the majority of the Internal Appeals Committee.

E. In its surrejoinder the EPO maintains its position in full.

CONSIDERATIONS

1. The complaint to this Tribunal was filed on 29 October 2009. At that time, the President of the EPO had not taken a decision on the recommendations that the Internal Appeals Committee made in its report of 8 June 2009 on the complainant's appeal against the decision to transfer him. More than sixty days had elapsed since the recommendations were made. Thus, the complainant was apparently exercising the right conferred by Article VII, paragraph 3, of the Statute of the Tribunal in filing his complaint. If so, the subject matter of the complaint would have been, at the time of filing, an implied decision of the President of the EPO to reject the recommendations of the Committee. In fact, the complainant erroneously identified on the complaint form the impugned decision as the decision of 10 October 2008, that being the original written notification of the decision to transfer him. No point is raised by the EPO in its submissions about this issue. Indeed, in its reply the EPO acknowledges that the complaint is receivable.

2. However, an express decision was subsequently made. On 9 December 2009 the Director of Regulations and Change Management wrote a letter to the complainant on behalf of the President setting out the President's decision. This letter is annexed to the EPO's reply and submissions are made by the EPO by reference to its content. The Organisation's reference to this letter is not challenged by the complainant in his rejoinder. Consequently, and in accordance with its case law, the Tribunal finds it convenient to consider the complaint by reference to the express decision of 9 December 2009 (see Judgment 2786).

3. The express decision is fundamentally legally flawed and it is convenient to move straight to that issue. There was a division of opinion amongst the members of the Internal Appeals Committee. The majority of the members recommended that the appeal be allowed, that the transfer of the complainant be set aside, that the complainant be redeployed to a post commensurate with his experience, preferably within PD5.1, and that he be reimbursed for the costs of the proceedings. These recommendations were substantiated by 15 pages of detailed analysis of the facts and an assessment of whether the transfer was appropriate in the circumstances. The minority recommended in much briefer reasons that the appeal should be rejected.

4. In the letter of 9 December 2009 the Director of Regulations and Change Management commenced with two paragraphs of introductory commentary. He then said:

> "I am asked to inform you that the President has decided to follow the minority opinion of the Internal Appeals Committee and for the reasons expressed therein as well as put forward by the Office during the appeal proceedings to reject your appeal as unfounded in its entirety."

This was followed by three numbered sections of one or a number of paragraphs which appear to be the reasons, in a numbered form, for the President's decision as relayed by the Director. The first numbered paragraph commenced:

> "1. More specifically, [the Tribunal in Judgment] 1929 (consideration 5) defined the scope of the review of transfer decisions as follows: *'In principle, an organisation is the judge of its own interests and the Tribunal will not substitute the organisation's views with its own; it will not interfere unless the decision is ultra vires, or there is a formal or procedural flaw or a mistake of law or of fact, or some material fact has been overlooked, or some obviously wrong conclusion drawn from the evidence, or there is misuse of authority.'*
>
> In view of the above scope of review, the President does not agree with the majority opinion that the reasons provided for the transfer were insufficient to justify it without [the complainant's] consent. This conclusion appears to have exceeded the above limits of the legal review applicable to the discretionary decisions such as transfers."

In this numbered paragraph, the Director stated the President's reasoning as to whether the transfer was a reasonable measure and indicated:

> "The President thus endorses the finding of the minority that the transfer was reasonably related to the lawful objectives to be achieved, did not involve any wrong conclusions drawn from the facts of the case and finally, **in view of the limited scope of the review of discretionary decisions**, that the Office's relevant interests prevailed." (Emphasis added.)

5. From these two passages it is clear that the President's approach to the opinion of the majority was coloured by her view that the role of the Internal Appeals Committee was limited and that the majority of the Committee's members had exceeded those limits. This involves a fundamental misconception of the role of the Internal Appeals Committee and confuses its role (and the principles governing it) with the role of a judicial body engaged in judicial review of administrative decisions such as this Tribunal (and the principles governing such a body).

6. The Internal Appeals Committee is constituted by Article 110 of the Service Regulations. Article 111 concerns the functioning of the Committee and declares that the members of the Committee "shall be completely independent in the execution of their task". Article 113 concerns the procedure of the Committee. It requires that all the papers submitted to the Committee "shall include

all material necessary for the investigation of the case". It provides that the Committee is authorised to receive oral or written evidence, carry out further investigation and "call for any document or information relevant to the matter before it". The Committee is also authorised to adopt its rules of procedure. Those rules of procedure contemplate the calling of witnesses and the tape-recording of their evidence. These provisions do not suggest that the Committee's task is anything other than reviewing the decision under appeal, on its merits. That is to say, the task of the Internal Appeals Committee is to determine whether the decision under appeal is the correct decision or whether, on the facts, some other decision should be made. While provisions establishing an internal appeal committee or board may limit its functions, this is not the case in relation to this Internal Appeals Committee established under the Service Regulations applying to the permanent employees of the EPO.

7. Of course the authority of the Internal Appeals Committee is limited to making recommendations and, to that extent, the ultimate decision-making power remains, in a case such as the present, with the President of the Office. However, the President is obliged to give proper consideration to the recommendations of the Committee and not avoid addressing the reasoning of its members by wrongly indicating, as in this case, that the majority of the Committee's members had exceeded the limits of their role in determining the appeal.

In the present case, the approach of the President appears to have had the result that several key features of the analysis of the majority of the members of the Internal Appeals Committee were either not referred to by her, the President, or glossed over in her reasoning. For example, there is no adequate answer to the majority's view that the transfer of the complainant could not have been justified because there was then an urgent need for examiners given that the complainant would have required three years' training. Nor is there an adequate answer to the complainant's claim, accepted by the majority, that "he went from being an administrator and experienced project manager to being an entry-level examiner, a major change in status". The

President's approach means that her decision was not "fully and adequately motivated" as is required when a final decision refuses, to a staff member's detriment, to follow a favourable recommendation of the internal appeal body (see Judgment 2339, consideration 5).

8. A similar issue concerning the role of an appeal board was considered by the Tribunal in Judgment 3077, a case concerning selection for appointment to a particular position of an official of the International Labour Organization. In that matter the Tribunal said:

> "3. The Board stated in its report that it had been guided by the Tribunal's well-established case law according to which an appointment is a discretionary decision, and that it therefore had to confine itself to determining whether or not unfair treatment had occurred and whether the competition procedure had been flawed. It added that it was not called upon to 'give its opinion on the candidates' respective merits'. […]
>
> The complainant submits that the Board, in undertaking only a limited review of the decision not to appoint him to the post for which he had applied, assumed the role of an administrative court and deprived him of his right to an effective internal appeal. The Board was certainly wrong to rely on the case law regarding the Tribunal's limited power of review when defining its own competence (see Judgment 3032, under 10), and the complainant is right to say that the Board is not an administrative court whose sole responsibility in principle is to review the lawfulness of decisions which are challenged. […]"

9. The Tribunal has stated that "the right to an internal appeal is a safeguard which international civil servants enjoy in addition to their right of appeal to a judicial authority" (see Judgment 2781). In the present case, the complainant has not enjoyed the full benefit of an internal appeal because the President of the Office erroneously treated the lawfully founded recommendations of the majority of the Internal Appeals Committee's members as involving an excess of power. The Tribunal notes that the majority of the Committee's members did refer on several occasions, unnecessarily, to decisions of this Tribunal as providing guidance in their consideration of the complainant's appeal. A minority of the Committee's members did so once as well, though in very general terms. However, these references in the opinion of the majority of the Committee's members do not appear to have limited

their approach and were used as a means of identifying topics that were then discussed in detail.

In the result, the decision of 9 December 2009 should be set aside and the case remitted to the Organisation to consider it again according to law. The complainant is entitled to moral damages in the amount of 10,000 Swiss francs. The complainant is entitled to his costs of bringing this complaint in the amount of 6,000 francs.

DECISION

For the above reasons,

1. The decision of the President of the Office recorded in the letter of 9 December 2009 to reject the complainant's appeal is set aside.

2. The case is remitted to the Organisation to consider the recommendations of the Internal Appeals Committee in accordance with consideration 7 above.

3. The Organisation shall pay the complainant 10,000 Swiss francs in moral damages.

4. It shall also pay him 6,000 francs for legal costs.

5. All other claims are dismissed.

In witness of this judgment, adopted on 9 November 2012, Mr Seydou Ba, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2013.

Seydou Ba
Giuseppe Barbagallo
Michael F. Moore
Catherine Comtet