

L. (No. 7)

v.

EPO

133rd Session

Judgment No. 4488

THE ADMINISTRATIVE TRIBUNAL,

Considering the seventh complaint filed by Ms M. L. against the European Patent Organisation (EPO) on 31 October 2014, the EPO's reply of 9 March 2015, the complainant's rejoinder of 18 June, corrected on 26 June, and the EPO's surrejoinder of 15 October 2015;

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 her to another post.

The complainant is a former employee of the European Patent Office, the EPO's secretariat. At the material time she was Principal Director of Principal Directorate Quality Management (PDQM) at grade A6.

At a meeting held on 26 September 2012 the President of the Office informed the complainant about his intention to announce a vacancy at A6 level in Directorate-General 2 (DG2) to address a pressing need for high-level strategic analysis and policy recommendations. This would take place in the context of the restructuring of PDQM and the new post would be filled by transfer. As the President had identified the complainant as a highly suitable candidate, she was invited to reflect on this professional perspective and give her feedback. This proposal was

confirmed in the President's letter to the complainant of 1 October 2012.

The complainant, who was on sick leave as of September, provided her feedback by a letter of 10 October. She indicated that she was willing to consider a change in the interest of the EPO provided that it was not seen as a demotion and that the terms and conditions of her contract were respected. With respect to the proposal, she had come to the conclusion that the level and scope of the duties assigned to the new post did not correspond to the level of grade A6. Therefore, she was not able to accept his proposal but noted that she was willing to add these duties to those presently falling under her responsibility as Principal Director PDQM.

The vacancy for the post of "Senior Advisor on Quality" was published on 16 October. The complainant did not apply.

The President informed the complainant by letter of 13 November that he intended to transfer her, with effect from 15 November, to the post advertised, by which the interests of the EPO and her own would be best served. On 21 December 2012 the complainant's counsel lodged an internal appeal against that decision.

A hearing was held on 4 December 2013. In its opinion of 17 June 2014 the Internal Appeals Committee followed the approach taken by the Tribunal in Judgment 2819 by analysing the generic job description for an A6 level post in the Service Regulations for permanent employees of the European Patent Office (hereinafter "the Service Regulations") and comparing it with the duties allocated to the complainant. It unanimously found that the level of duties assigned to the Senior Advisor post did not correspond to the requirements for an A6 grade post as laid down in the job description of the Service Regulations. Consequently, it found the decision to transfer the complainant unlawful in that it did not sufficiently respect the complainant's dignity. A majority recommended to set aside the decision and refer the case back to the Office, and to award her 25,000 euros in moral damages as well as costs. A minority recommended to set aside the decision, to reinstate the complainant in a "proper" A6 post, and to award her 35,000 euros in moral damages as well as costs.

By a letter of 12 August 2014 the complainant was informed of the decision not to follow the opinion of the Internal Appeals Committee and to reject her appeal as unfounded. The Administration explained

that the decision to transfer her was justified by the overriding interests of the EPO and that the generic job description did not exclude the possibility to assign an A6 employee to a post whose duties are not listed in the generic description. In its view, what mattered was that the duties assigned did correspond fully to an A6 level, which in its view was the case. That is the impugned decision.

The complainant, who resigned for health reasons effective 31 July 2014, asks the Tribunal to set aside the impugned decision and to grant her material damages for loss of earnings. She claims a sum corresponding to the difference between the A6 salary which she would have received if she were on active duty in an A6 post until her sixty-fifth birthday and the actual pension received for the period 1 August 2014 to 31 January 2017, as well as the payment, as from 1 February 2017, of a newly calculated pension corresponding to the amount which she would have received if she had been on active service at grade A6 until 31 January 2017. She also claims 35,000 euros in moral damages for the injury to her health and professional dignity and standing, as well as costs for both her internal appeal and the proceedings before the Tribunal.

The EPO submits that her claim for material damages is irreceivable for failure to exhaust internal remedies, as it is based on facts subsequent to the decision to transfer her to another post. It requests the Tribunal to dismiss the complaint as otherwise unfounded.

CONSIDERATIONS

1. The complainant is a former member of the staff of the EPO who separated from service on 31 July 2014. She filed this, her seventh complaint, on 31 October 2014. The decision impugned in these proceedings is a decision of the Vice-President of Directorate-General 4 (DG4) of 12 August 2014, acting on delegation of power from the President of the Office, rejecting an appeal against a decision the President had earlier taken on 13 November 2012. That latter decision was to transfer the complainant from her position of Principal Director of Principal Directorate Quality Management at grade A6 to a newly created post of Senior Advisor on Quality also at grade A6.

2. This seventh complaint has been followed by an eighth and a ninth complaint, the latter having been filed on 6 December 2019. In her eighth and ninth complaints, the complainant sought the joinder of all three complaints. For reasons explained in the judgment concerning the eighth complaint, no joinder has been ordered.

3. The complainant opposed the transfer effected by the decision of November 2012. She subsequently pursued a grievance within the Organisation which culminated in a favourable report of the Internal Appeals Committee though its conclusions and recommendations were rejected in the impugned decision of 12 August 2014.

4. Within the Internal Appeals Committee there was a division of opinion on certain matters. However, the members of the Committee were unanimous in their conclusion that the transfer decision could not withstand legal scrutiny. In reaching this conclusion the Committee applied, correctly, the reasoning of the Tribunal in Judgment 2819. That judgment, delivered in public on 8 July 2009, concerned the EPO and the purported transfer of a staff member at grade A6. Both the minority and majority of the Internal Appeals Committee in the present case said that the level of duties assigned to the Senior Advisor on Quality post did not correspond to the requirements for an A6 grade laid down in the job descriptions of the Service Regulations. Thus, they concluded, the transfer was unlawful and did not sufficiently respect the complainant's dignity. Importantly and decisively, all members of the Committee concluded that none of the conditions for an A6 post were met, to use the language of the majority.

5. The response of the Vice-President of DG4 is contained in the following passage of the decision of 12 August 2014:

“The President is responsible for the management of the Office. In this role he has to take decisions allowing to respond to the Office's changing needs and to ensure its proper functioning. Consequently, job descriptions are necessarily generic in order to allow a flexible application to the Office's changing needs, in particular at senior management level. This approach was therefore considered by the majority of the Appeals Committee as ‘certainly conclusive’ (paragraph 21 of the majority opinion). For the Office, however, a consequence of this line of reasoning is, contrary to the Committee's majority view, that the generic job description does not exclude the possibility to assign an A6 employee to a post whose duties are not listed in this generic description. What matters if an employee in grade A6 is

assigned to a newly created post because at the relevant time no operational A6 post is vacant, is the content of the duties assigned. Such assignments have already been made to both the employee's and the Office's satisfaction in the past.

In your case adapting to the Office's changing needs meant providing you upon your transfer with a specific and detailed job description entailing duties that could have been performed only by a senior manager. The duties assigned to the post of the Senior Advisor on Quality corresponded fully to an A6 level as they were relevant from a strategic point of view for the Office and involved therefore cross-DG tasks aimed at delivering a broad analysis for the President's decision making in the area quality. [...]"

6. However, this response does not answer the fundamental proposition emerging from Judgment 2819, namely that if the new tasks involve none of the tasks specified in the Service Regulations for a grade A6 post, the transfer did not respect the transferee's dignity (see consideration 8, as explained more fully in that judgment). The EPO's pleas that this judgment should not be applied are not persuasive. If the EPO wished to be able to transfer staff at the A6 level more flexibly for the reasons advanced in the pleas and to do so notwithstanding the conclusions of the Tribunal in Judgment 2819, the relevant Service Regulations could have been amended at any point since July 2009.

7. The assessment made by the Internal Appeals Committee in these proceedings to the same effect as made by the Tribunal in Judgment 2819, should be respected. The Tribunal's case law establishes in, for example, Judgment 4407, at consideration 3, that an internal appeal body's report warrants considerable deference in circumstances where its report involves a balanced and thoughtful analysis of the issues raised in the internal appeal, as it does in this case, and on its analysis its conclusions and recommendations were justified and rational, as again they are in this case (see also Judgments 3608, consideration 7, 3400, consideration 6, and 2295, consideration 10). The majority and minority agreed on the central issue but differed on the question of whether, when the transfer decision was set aside, the matter should be remitted to the EPO (the majority) or the complainant should be reinstated to an A6 position (the minority). This difference is no longer material as the complainant separated from the EPO in July 2014. Also, the Committee members concluded, respectively, that the complainant should be paid 25,000 euros in moral damages or 35,000 euros.

8. The complainant seeks, by way of relief, material damages for loss of earnings and adjustments to her pension entitlements on the assumption she would have worked until aged 65. But neither arise from the unlawful transfer decision. She seeks moral damages in the sum of 35,000 euros. This is a reasonable and appropriate figure. The complainant is entitled to costs for these proceedings, in which she represented herself, which the Tribunal assesses in the sum of 1,000 euros. She is not entitled to an order for legal costs incurred in the internal appeal proceedings as there are no exceptional circumstances to justify such an award (see, for example, Judgment 4399, consideration 13).

DECISION

For the above reasons,

1. The impugned decision of 12 August 2014 is set aside.
2. The EPO shall pay the complainant moral damages in the sum of 35,000 euros.
3. The EPO shall pay the complainant 1,000 euros in costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 18 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