

EIGHTY-THIRD SESSION

In re Kagermeier (Nos. 1 and 2)

Judgment 1672

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Ingrid Maria Kagermeier against the European Patent Organisation (EPO) on 8 June 1995, the EPO's reply of 18 September, the complainant's rejoinder of 24 November 1995, the Organisation's surrejoinder of 14 February 1996 and further submissions of 25 October 1996, the complainant's observations of 14 February 1997 on those submissions and the EPO's brief of 21 March 1997;

Considering the application filed by Mr. Desmond Radford on 25 April 1997 to intervene in that complaint and the Organisation's observations thereon of 6 May 1997;

Considering the second complaint filed by Mrs. Kagermeier against the EPO on 9 June 1995, the Organisation's reply of 18 September, the complainant's rejoinder of 25 November 1995, the EPO's surrejoinder of 14 February 1996, the EPO's further submissions of 25 October 1996, the complainant's observations of 14 February 1997 on those submissions and the EPO's brief of 21 March 1997;

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

Having examined 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 German, is an official of the European Patent Office, the secretariat of the EPO, at grade B3. At the material time she was employed in the Office's Receiving Section in Directorate-General 1 (DG1) at The Hague. She was also a member of the General Advisory Committee (GAC) which under Article 38 of the Service Regulations, gives "a reasoned opinion" on questions submitted to it by the President of the Office on "any proposal which concerns the whole or part of the staff".

In November 1992 the EPO set up ten units, known as Search Assistance Services (SAS), as part of a plan to "decentralise" several departments at The Hague. Each SAS served three, four or five directorates in charge of "patent search". The new structure entailed changes in the working methods and so-called "working-place descriptions" of several hundred officials. The term "working-place description", a literal translation from the German "*Arbeits-platzbeschreibung*", is used interchangeably with "job specification".

The complainant learned from a note of 8 January 1993 which the Director in charge of "Finance/Personnel" addressed to "all SAS staff" that "new working-place descriptions" would "supplement" the job descriptions they already had.

By letters dated 27 January 1993 the complainant appealed to the President against the "decentralisation and diversification" of the Receiving Section and her new "working-place description". In her capacity as a member of the General Advisory Committee she asked the President in letters of 17 February 1993 to withdraw the new working-place descriptions on the grounds that the new system had "adverse consequences" for many staff at The Hague and was unlawful for want of prior consultation of the GAC.

The President referred her appeals to the Internal Appeals Committee and it submitted a single report dated 30 December 1994. The majority recommended allowing her claims to the withdrawal of her working-place description and to her reinstatement in the duties she had had before "diversification of tasks". But it unanimously recommended dismissing her claims to the abolition of the SAS and to a return to the old system.

In a letter of 13 March 1995, which she is impugning, the President rejected her internal appeals.

B. The complainant submits that the decentralisation of her section is unlawful. She alleges mistakes of law and the breach of her rights and of the general principles of the international civil service.

She pleads infringement of Article 38 of the Service Regulations under which she says the EPO has a duty to consult the GAC and the Local Advisory Committee (LAC) on proposals which affect the whole or a part of the staff. Since the new working-place descriptions concern many staff in DG1 the President's failure to refer the matter to the committees ignored the requirement of consultation. In her second complaint she charges the Administration with preventing her from carrying out her duties as a member of the GAC.

Diversification of tasks, she submits, meant that officials' duties no longer had anything to do with their grade or post. The new system, which the Administration makes out to be provisional, offended against good faith and her right to a hearing. She says the EPO obscured her position in law by having her work in an environment that did not fit her job description. In breach of equal treatment the President consulted the General Advisory Committee on the working-place descriptions for staff in category A but not for staff in categories B and C; he also promised "special attention" for officials who accepted the new scheme.

She further objects to the composition of the Appeals Committee on the grounds of the partiality of one of its members.

In both complaints she asks the Tribunal to declare her working-place description unlawful and order a return to the old system. She claims (1) 10,000 guilders in moral damages for breach of "the rights to be heard or to be consulted of the General Advisory Committee and the subsequent discrimination"; (2) the same amount in moral damages for "lack of impartiality" in a member of the Appeals Committee; and (3) the same amount in costs. In her first complaint she claims the same amount in moral damages for "unlawful implementation of the decentralisation, diversification and introduction of the 'working place description' and the subsequent discrimination".

C. The EPO replies that the complaints are in part irreceivable. In her internal appeals the complainant made no claim to compensation on the grounds of failure to consult the GAC. It argues in its reply to her first complaint that in any event such failure did not infringe any right she might have as an employee; and it points out in reply to her second complaint that she pleaded no injury as a member of the GAC from the failure to consult it. Nor did she lodge an internal appeal against the system of decentralisation and diversification. So her claims to damages under those heads are irreceivable for failure to exhaust the internal remedies open to her.

Her objections to the new working-place description are irreceivable because she shows no cause of action. On 25 March 1993 she was transferred, as she had asked, to another unit and so was no longer working in an SAS.

On the merits the EPO submits that the system of decentralisation and diversification of duties, which it adopted in the exercise of its discretion is lawful. The "working-place descriptions" do not supersede the job descriptions which are provided for under Article 3(1) of the Service Regulations and which are still in force; nor are they either permanent or at odds with those job descriptions. They were provisional and intended to give the staff an idea of what duties members of an SAS might have in future; so the Administration was under no duty to submit them to any of the advisory committees.

The Appeals Committee itself rejected the complainant's objection that one of its members had a personal interest in the dispute.

D. In her rejoinders the complainant disputes the EPO's pleas on receivability and the merits. As to her first complaint she submits that it is plain from the list of duties in her staff report that the Organisation did apply the working-place descriptions: that caused her injury at the time and led her to ask for a transfer. On her other complaint she points out that by lodging an internal appeal as a member of the GAC she meant it to be understood that in her view the Administration had impaired her rights as such.

E. In its surrejoinder the EPO observes that there is no new argument in the rejoinder to make it change its position. The fact that a working-place description served as the basis for appraisal of performance does not make it final: it is only reasonable that duties should change according to needs. In any event, she was not "compelled" to carry out the duties in the working-place description.

F. In its further brief the Organisation says that the "draft final job descriptions" of the staff concerned by the process of decentralisation have been put to the General Advisory Committee, which has set up a working party to adopt a "reasoned opinion" within the meaning of Article 38(3) of the Service Regulations.

G. In her comments the complainant observes that the EPO's further consideration is incomplete in that it fails to reflect a "dispute" that rose at the Advisory Committee's meeting. She says that the administration presented its members with a *fait accompli* by providing the papers relating to the job specifications only a fortnight before the meeting -- the minimum that the Service Regulations require -- without any prior discussion between it and the staff representative or the working party. She submits that the President acknowledged at the meeting with the staff in January 1997 that it had been unlawful to bring in the job specifications in January 1993. She invites the Tribunal to hear evidence from the chairman of the Central Staff Committee.

H. In its final brief, the defendant explains that the new job specifications for staff in category B working for an SAS unit were brought in on 3 March 1997. It points out that since the purpose of the complaint is to challenge the lawfulness of the working-place that went out in 1993, there is no need to consider any further how the new descriptions came to be adopted or what they say.

CONSIDERATIONS

1. Article 3(1) of the EPO Service Regulations provides that the President of the Office "shall draw up specific job descriptions for each of the posts to which permanent employees may be appointed" and that on a proposal by the President the Administrative Council "shall determine the grade justified by each job description, taking into account the nature of the duties involved, the level of responsibility and the qualifications required".
2. The Administrative Council decided in 1983 to consolidate posts graded A1 to A4 in what the EPO calls the "Staff Plan". Also in 1983 it approved in accordance with Article 3(1) of the Service Regulations new "job descriptions", for which the terms in its other official languages were "*descriptions de fonctions*" and "*Stellenbeschreibungen*". They were set out in document CA/46/83. On the advice of the Advisory Group on Remuneration the Council decided in 1990 to take similar action for the B category of staff by having two B groups: grades B1 to B4 for "clerical officers" and B3 to B5 for "formalities officers". The Office communicated that decision to the staff in circular 200 on 22 February 1991 and none of the staff at The Hague lodged an internal appeal.
3. Technical innovations in the processing of data were greatly altering the duties to be performed by EPO staff and the means of performing them. So the Organisation thought it necessary to carry out a thorough reorganisation of administrative services at Directorate-General 1 (DG1) that would make for the decentralisation and diversification of jobs. Part of the reorganisation consisted in setting up decentralised units known as Search Assistance Services (SAS) to render administrative services to several directorates. A pilot unit having been set up in 1991, the EPO decided in 1992 on the progressive decentralisation of DG1. By a note dated 17 July 1992 and headed "Decentralisation in The Hague" the Director of Personnel/Finance informed the staff of what was to be done.
4. On 28 October 1992 managers of the SAS units were appointed as from 1 November 1992. The administration was decentralised into ten such units, each serving three to five search directorates, the group consisting of the SAS unit and its search directorates being known as a "cluster".
5. As distinct from the term "job description" -- "*description de fonctions*" and "*Stellenbeschreibung*" -- in Article 3(1) of the Service Regulations a "job specification" -- "*description de poste*" and "*Arbeitsplatzbeschreibung*" -- denotes, according to the EPO, "the different duties involved in a specific post of a certain grade". It is drawn up "on the basis of precedents for each post". The term "working-place description", a literal translation from the German, is used interchangeably with "job specification": the Principal Director of Administration explained as much to the complainant in a letter dated 28 October 1993, which described it as "a detailed working-place description for each working place within the framework of ... job descriptions".
6. On 8 January 1993 the Director of Personnel/Finance sent to all SAS staff a note headed "New working place descriptions". Appended were such descriptions headed "B4/1 in a SAS-Team" and "B5/3 in a SAS-Team". A letter that the Administration wrote in German to SAS managers on 11 January 1993 described them as "draft working-place descriptions" ("*Skizzen der Arbeitsplatzbeschreibungen*"). They prompted two internal appeals from the complainant which have culminated in the present two complaints.
7. She lodged an appeal in letters dated 27 January 1993 to the President. She said that the working-place description introduced by the Administration's letter of 11 January did not correspond to her then job description

and therefore "adversely affected" her. She contended that, in breach of the Service Regulations, the President had omitted to consult the General Advisory Committee (GAC). She asked for a declaration that her "present job description is still in force" and that "the new working-place description is invalid" and to "cancel the introduction" of the working-place description.

8. She made another appeal in a letter dated 17 February 1993 to the President. She referred to the working-place descriptions introduced by the Administration's letter of 11 January and cited Articles 3 and 38 of the Service Regulations. She contended that "The introduction of the new working practice and method of work organisation, known as the 'cluster' system in combination with the 'working place description' has many serious and adverse consequences for a large number of the administrative staff in The Hague". The GAC -- she went on -- had not been asked for an opinion, contrary to the Service Regulations, and she asked the President to declare the letter of 11 January 1993 invalid. On 13 April 1993 she wrote a letter to the Director of Staff Policy referring to the new working-place descriptions in the letter of 11 January and to the note of 8 January from the Director of Personnel/Finance. She asked for a declaration in a staff circular that they were both invalid.

9. In her brief in support of her appeal of 27 January 1993 her claims were to:

- "- declaring the 'working-place description' illegal;
- declaring the implementation of the 'working-place description' being the SAS system illegal;
- the removal of the implementation of the diversification which is put into force by the cluster/SAS units;
- the old situation as existed till November 1992 is put into force again."

In her brief on her appeal of 17 February 1993 she sought the same relief. She further contended that neither the GAC nor the Local Advisory Committee (LAC) had ever been consulted, that there was no reasoned opinion from them on the matter, and that the Committees' rights and so her own had been infringed. The main difference between her two appeals was that in the second she developed her contention that the failure to consult the GAC was in breach of Article 38(3).

10. The Appeals Committee joined the two cases and issued a single report on them on 30 December 1994. The Tribunal too joins the two complaints since they deal with the same subject and arise out of the same set of circumstances and the same decision.

11. Some of the relief sought in the two complaints falls outside the scope of the relief sought in the internal appeals. The fourth claim that the complainant makes in her first complaint and the third claim in her second are akin to the relief that she sought in her internal appeals and that the Appeals Committee set out in the following terms:

- "(a) to declare the 'working-place description' illegal;
- (b) to declare the implementation thereof being the SAS system illegal;
- (c) to remove (annul) the implementation of the diversification of tasks in the cluster/SAS units;
- (d) to restore the situation as it existed before November 1992."

A complainant who fails to claim relief in an internal appeal may not do so in a complaint to the Tribunal because the internal means of redress will not, as Article VII(1) of the Tribunal's Statute requires, have been exhausted. So, apart from the relief that the complainant claims on account of the composition of the Appeals Committee, any relief she claims in her two complaints that goes beyond the relief she claimed in her internal appeals is irreceivable.

12. As to the relief that the complainant claims for the effect of the working-place description on her own position at work, she returned at her own request to her former unit as from 25 March 1993. From that date she was no longer working in an SAS unit and so was no longer affected by the "working-place description" she wants to have withdrawn. Moreover, the President's letter of 13 March 1995 -- the decision she is impugning -- states:

"The job specifications which were dispatched in January 1993 are drafts of how future individual working places in a S.A.S. group were seen.

Also, job specifications have to be clearly distinguished from the job descriptions indicated in Article 3, first paragraph, of the Service Regulations. The latter are subject of discussion in the General Advisory Committee and are submitted to the Administrative Council for approval of the corresponding grade. The idea behind the job specification is, however, to describe in more detail, and for every individual staff member, what duties are expected of him.

As was stressed several times, the present job descriptions, approved by the Administrative Council in 1983, remain in force. As you have experienced yourself, you were at no time obliged to perform duties of another group of grades than your own. For the reasons set out above, the distribution of drafts of future job specifications served an informative purpose, and had no adverse effect on your administrative position, which is a condition for challenging a decision in a legal procedure. Since that condition has not been met, I have decided to reject the internal appeals."

The conclusion is that the relief claimed by the complainant under this head serves no purpose, and for two reasons. One is that she is no longer working in an SAS unit; and the other is that the President's written assurance that the drafts were merely informative and had "no adverse effect" on her administrative position gave her satisfaction.

13. There remains the issue of failure to consult the General Advisory Committee. The complainant's argument is that that failure constitutes an infringement of her own rights as a member of the Committee.

14. Article 38(3) of the Service Regulations reads:

"The General Advisory Committee shall, in addition to the specific tasks given to it by the Service Regulations, be responsible for giving a reasoned opinion on:

- any proposal to amend these Service Regulations or the Pension Scheme Regulations, any proposal to make implementing rules and, in general, except in cases of obvious urgency, any proposal which concerns the whole or part of the staff to whom these Service Regulations apply or the recipients of pensions;

- any question of a general nature submitted to it by the President of the Office;

- any question which the Staff Committee has asked to have examined and which is submitted to it by the President of the Office in accordance with the provisions of Article 36."

15. It is common ground that there was no consultation of the GAC before the Director of Personnel /Finance circulated the draft working-place descriptions with the note of 8 January 1993. The Organisation pleads that since those descriptions were provisional and sent merely for information, it had no obligation of submitting them to any advisory committee, be it local or general. It is true that in the Appeals Committee's report the majority rejected the Administration's contention that the new working-place descriptions were only provisional and that the staff could derive no rights from them. Yet the President's decision was explicit: it said that they merely served the purpose of information and had no adverse effect on the administrative status of the staff. That statement, which is binding on the Organisation, means that neither rights nor obligations flow from the draft working-place descriptions. The EPO's position has therefore shifted since the Appeal Committee reported on the complainant's two appeals.

16. Article 38(3) requires a reasoned opinion from the General Advisory Committee on "any proposal which concerns the whole or part of the staff". As long as the preliminary drafts were not intended to have legal effect, the obligation of consulting the Committee did not arise. Only if the Organisation had decided to put those drafts into effect would it have had to consult the GAC before it might properly do so. In this instance it committed no breach of Article 38(3), and the plea fails.

17. On 25 October 1996 the Administration submitted to the GAC for an opinion what it referred to as "draft final job descriptions" for the purpose of decentralisation of staff in DG1. They comprised draft "job specifications" for grades B1, B2, B3 and B4 in one group and for grades B3, B4 and B5 in the other. The GAC discussed the job specifications at meetings it held on 28 and 29 November 1996 in Berlin. Since opinion was split its chairman asked both sides to submit their diverging views to the President within three working days. On 3 March 1997 the President announced his decision to put new job specifications into effect for DG1 staff in the B category who were members of SAS teams. Those specifications differ according to the grade and group that the employee belongs to and the duties outlined in them reflect the differing levels of duties and responsibilities laid down in the job descriptions in force since 1983. Thus the draft descriptions circulated on 8 January 1993, which were, as has been said, merely informative and had no legal effect, have been wholly superseded by the job specifications announced on 3 March 1997 and no longer have any relevance.

The Appeals Committee proceedings

18. Lastly, the complainant is asking the Tribunal to condemn the Organisation's failure to ensure impartiality in the composition of the Appeals Committee and to award her damages on that count. She accuses one of its members of being partial and criticises the two members who made up the minority for making misleading and false statements and infers that they too were not impartial and objective.

19. Article 111 of the Service Regulations reads:

"The Chairman and members of the Appeals Committee and their alternates shall be completely independent in the execution of their task. In this respect they shall neither seek nor accept any instructions. If any one of them is required to take part in a case in which he might have a personal interest or in respect of which he participated in preparing the decision under appeal ... the Committee shall find, on being informed by the member concerned, or at the request of the appellant, or of its own motion, that the member concerned is unable to take part in that case."

20. The Committee itself rejected the complainant's request that it replace one of its members on the grounds that he was not impartial. It held that she had offered no new grounds in support and that in any case the conditions laid down in Article 111 of the Service Regulations for excluding a member were not fulfilled: the member she had named neither had any personal interest in the decision under appeal nor had taken any part in preparing it.

21. The Appeals Committee ruled on the complainant's objection to one of its members at the time of the hearings and in accordance with the rules, and she has not shown any reason why its ruling should be set aside. The plea fails.

The application to intervene

22. Since the first complaint fails, so too does Mr. Radford's application to intervene.

DECISION

For the above reasons,

The complaints, and the application to intervene in the first of them, are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Edilbert Razafindralambo, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

William Douglas
Mella Carroll
E. Razafindralambo
A.B. Gardner