

116th Session

Judgment No. 3273

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr T. K. against the European Patent Organisation (EPO) on 5 July 2010 and corrected on 8 August, the EPO's reply of 22 November 2010, the complainant's rejoinder of 21 February 2011 and the EPO's surrejoinder of 6 June 2011;

Considering Article II, paragraph 5, 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 and the pleadings may be summed up as follows:

A. The complainant joined the European Patent Office, the secretariat of the EPO, in June 1991 as an administrative employee, at grade B3. By a note of 1 August 2000 the complainant was informed that he would be detached as of 1 October 2000 and for a maximum period of three years to the Epoline Directorate. His detachment was subject to a six-month probationary period. At that time he held grade B4.

Pursuant to Administrative Council Decision CA/D 11/98 of 10 December 1998, the EPO introduced, as from 1 January 1999, a new career system in which the grade groups in category B were reduced from three to two. A new grade group B5/B1 was established, combining the former grade groups B1-B4 and B3-B5, which had previously overlapped. In addition, grade group B6/B4 was expanded to include employees other than programmers. Staff in grade group B5/B1 were referred to as “Administrative employees”, whilst staff in grade group B6/B4 were given the title “Supervisor/head of section”. Circular No. 253 of 21 December 1998 established the Harmonisation Committee for harmonising and making recommendations to the Principal Director of Personnel on the criteria to be applied in evaluating the level of the set of duties entrusted to the staff members graded in category B or C. The Committee hired an external company of consultants in December 2003 to assist it in evaluating posts and classifying them in the newly created grade groups. The purpose of the job grade evaluation was to carry out an analysis of the jobs in the B and C categories to verify whether the grading was in line with the duties performed.

The evaluation process started with the completion of a job analysis questionnaire by staff. The complainant did so in March 2004, indicating that he was a Brand Manager and that he performed the additional duties of an Event Manager. In June 2004 the external consultants, having assessed all the posts in categories B and C, sent their report to the Harmonisation Committee, indicating inter alia that the complainant’s post of Brand Manager belonged to grade group B5/B1. The report was then forwarded for decision to the Principal Director of Personnel, who informed the complainant on 3 November 2004 that his post was correctly graded. By a note of 28 September 2005 the complainant was informed that his detachment to the Epoline Directorate was extended until the end of December 2005.

In the meantime a Job Grade Evaluation Panel (JGEP) was established to allow employees to request a review of the grading of their post, if they so wished. On 12 December 2005 the complainant

requested the JGEP to review the grading of his post contending that it belonged to grade group B6/B4 and not to B5/B1. In his view, the evaluation of his post had not been conducted diligently and his post had not been granted the correct score, as some of his duties were ignored. By a letter of 17 July 2006 the complainant was informed that the Vice-President in charge of Administration endorsed the recommendation of the JGEP to confirm the grading of his post. In the meantime, the complainant was informed that his assignment to the Epoline Directorate was extended until further notice.

In a note of 15 December 2006 the Principal Director of Personnel informed all staff in categories B and C that the review phase of the job grade evaluation had been completed and that the results would take effect on 1 January 2007. Those who considered that the level of their tasks still differed from the grading of their post were authorised to file an appeal with the Internal Appeals Committee (IAC). The complainant did so by a letter of 6 February 2007 criticising the Administration for having refused to provide him with details of the evaluation results and alleging that the evaluation procedure would not have been carried out with the accuracy one would expect. He alleged that “crucial documentation” was withheld from him, which he considered to be “cynical but also [...] insulting”. He requested that his post be placed in grade group B6/B4, that he be given full details of the JGEP’s evaluation of his post and that he be granted material and moral damages together with costs. He was informed, by a letter of 3 April 2007, that the matter had been referred to the IAC since the President of the Office considered that his requests could not be granted. An exchange of correspondence followed until mid-2009. Thus, by an e-mail of 5 April 2009 the complainant amended his claims before the IAC requesting that the post of “brand manager/events manager” be placed in grade group B6/B4 and that he be assigned grade B6 as from 2000. He also asked that, as from 2004, the post of Brand Manager be placed in grade group A4/A1 on the ground that a similar post in Munich was advertised in October 2004 at grade A1 and that, by 2004, he had gained considerable experience

and training to hold a higher grade. He further asked that the post of Application Manager, to which he was transferred in the meantime, be upgraded to grade group A4/A1 as from November 2006.

In its opinion of 10 February 2010 the IAC considered unanimously that the complainant's claim regarding the classification of the post of Application Manager was inadmissible because he was not assigned to that post when the JGEP issued its conclusions in 2006. On the merits, the majority of the members of the IAC observed that the note of 1 August 2000 by which the complainant was informed of his detachment to the Epoline Directorate did not include any details of the type of post to which he was assigned or the duties he would have to perform. However, the evaluation procedure was not flawed on that ground because the matter in dispute was the evaluation of the complainant's post and not the on-loan procedure. It also found that the methodology used to evaluate the complainant's post was in line with the Service Regulations for Permanent Employees of the European Patent Office. It also considered that no essential fact was overlooked, noting *inter alia* that the complainant himself had filled in the job evaluation questionnaire which was submitted to the external consultants to evaluate his post, and had indicated therein that he had performed the additional duties of an Event Manager. The majority therefore recommended that the appeal be dismissed as irreceivable in part and unfounded in all other respects. It also recommended that the complainant bear the costs he had incurred in the course of the proceedings because, in its view, he had suffered no injury.

Two members of the IAC disagreed with the majority's opinion expressing doubts as to the suitability of the evaluation method developed by the external consultants and as to the way in which the evaluation methodology was applied. They found that essential facts were overlooked when the complainant's post was evaluated. They also noted that, at grade B4, the complainant performed his duties "semi-autonomously", which is one of the typical requirements for a post belonging to the B6/B4 grade group. In their view, there was no plausible reason for the difference in classification between the

complainant's post and the other Brand Manager post in Munich which belonged to grade group A4/A1. They further considered that the JGEP made an incorrect application of the external consultant's methodology by limiting the maximum number of points for certain factors. Therefore, they recommended that the complainant's claim with respect to the classification of the Brand Manager post be allowed and that his costs be reimbursed.

By a letter of 12 April 2010 the Director of the Department of Regulations and Change Management informed the complainant that the President of the EPO had decided to reject his claim for the classification of the post of Application Manager as irreceivable. The President otherwise rejected the appeal as unfounded explaining that a decision concerning the classification of a post is discretionary. In her view, the methodology used to evaluate the post of Brand Manager and the evaluation itself met the requirements of applicable rules. She added that the profile of the Brand Manager post referred to in the minority opinion was no longer relevant, as it dated back to 20 April 2004. She disagreed with the minority opinion that the JGEP had arbitrarily reduced the maximum number of points available for each factor to be taken into consideration to evaluate the complainant's post. In her view, there had been no deviation from the methodology applied by the external consultants. That is the impugned decision.

B. The complainant contends that proper procedures were not followed with respect to his assignment to the Epoline Directorate. He asserts that he was assigned to a new position and not detached because he took part in a selection process in the way of an interview and was subjected to a probationary period. In that respect he alleges abuse of process on the part of the EPO insofar as no vacancy notice was published for the Brand Manager post, which contravenes Article 4(2) of the Service Regulations.

He calls into question the objectivity and independence of both the external consultants and the JGEP. As the assignment letter of August 2000 did not contain any information concerning the job title, the job description or the grading relating to the post to which he was

assigned, it means that the external consultants and the JGEP evaluated a post which had no official existence. He adds that the work he performed was innovational and that the JGEP had therefore no basis to compare his duties with those performed by an employee holding a category B post. The only possible comparison was with a category A post which had the same title and very similar duties attached to it, but the review of category A posts were outside the JGEP's mandate. The complainant contends that some of his responsibilities were not taken into account during the evaluation of his post.

The complainant alleges lack of transparency with respect to the methods used to evaluate his post. He points to inconsistencies regarding the maximum number of points granted for a post, which was said to be 3,600, or 4,000 or even 4,100 points depending on the person the question was asked to. He contends that the external consultants introduced an additional criterion which was not in line with the Service Regulations.

Lastly, he alleges undue delay in the processing of his internal appeal stressing that the IAC took three years to issue its opinion on the appeal he filed by a letter of 6 February 2007.

The complainant asks the Tribunal to set aside the decision confirming that his Brand Manager post belonged to grade group B5/B1, to order that his post of Brand Manager be graded at B6 and be placed in grade group B6/B4 as from 2000 and that from 2004 it be upgraded to grade A2 within grade group A4/A1. He also requests "full disclosure of assessment" of his post. He claims material damages in an amount equivalent to the difference "in salary between the grade he was 'confirmed' in and the proper grading merited by his actual work, [...] up to when his grading [is] corrected". He further seeks moral damages in an amount of 50,000 euros plus costs. In addition, he requests that his post of Application Manager be placed in grade group A4/A1 with effect from November 2006.

C. In its reply the EPO contends that the complaint is irreceivable insofar as the complainant requests the upgrading of his post of Application Manager. It stresses that the IAC considered that the claim was time-barred and that it went beyond the initial subject matter of the appeal.

The EPO emphasises that the matter in dispute is the evaluation of the post of Brand Manager and not the on-loan procedure or the complainant's job specification. It nevertheless asserts that the complainant's detachment was regular and that he could not have expected to be provided with a job specification, as required under Article 3 of the Service Regulations, because on-loan assignments are not posts to which employees may be "appointed" within the meaning of that Article.

It contends that a decision concerning the grading of a post is discretionary, while stressing that the complainant's post was evaluated with due care on two occasions and that each evaluation produced a score below 3,000 which is the minimum threshold required to belong to the B6/B4 grade group. It asserts that the members of the JGEP were experienced staff in the evaluation of jobs and that they had an overview of all the posts within the EPO, which means that they had an overall picture of the situation for making a recommendation. They took into consideration all the information provided by the complainant in the job questionnaire and the additional information he had provided directly to the JGEP. The EPO indicates that detailed information about the evaluation was provided to the complainant during the internal appeal proceedings and therefore considers that his request for "full disclosure of assessment" should be rejected.

The EPO submits that the complainant misunderstood the evaluation methodology, which fully complied with the Service Regulations. It rejects the allegation of lack of transparency of the methodology used to evaluate the complainant's post, pointing out that he was provided with constant information about the evaluation procedure, as shown by the attached copies of the *Gazette*,

communiqués and other letters addressed to the complainant on that particular matter.

D. In his rejoinder the complainant alleges that the EPO violated the principle of fair and objective reporting given that he was assigned to a post for almost seven years without having a job description. He stresses that the Vice-President in charge of Directorate-General 2 set aside his staff report for the period 2006-2007 – a period during which he was first detached to the position of Brand Manager and then transferred to the position of Application Manager – noting irregularities (in particular the absence of a job description and a job classification), which rendered the reporting arbitrary and subjective. The EPO can not therefore now contend that the detachment to the Epoline Directorate was regular. In his view, he is entitled to moral damages because of the stress caused by the lack of job description.

The complainant maintains that the evaluation of his post was tainted with error of facts emphasising that, in 2010, the EPO published a vacancy announcement for a post of “Event manager” in the grade group A4/A1, the duties of which corresponded to those he performed as additional duties when he was a Brand Manager.

Regarding his claims, he indicates that he does not persist in requesting that his post of Application Manager be reclassified.

E. In its surrejoinder the EPO reiterates that the case at issue concerns the classification of the complainant’s post and not his performance. It maintains that his post did exist and that he performed his tasks on the basis of a regular on-loan assignment. Consequently, his post had to be evaluated.

CONSIDERATIONS

1. The impugned decision is that which was sent out on behalf of the President of the EPO dated 12 April 2010. The complainant received it on 19 April 2010. The complaint was filed on 5 July 2010. Receivability was an issue on the Application Manager aspect of the

complaint. The complainant has indicated that he is not persisting with this aspect of the complaint, which is accordingly formally dismissed.

2. By way of a brief context, the classification which the complainant challenges was done in the reclassification exercise, which was initiated out of Administrative Council Decision CA/D 11/98 of 10 December 1998. The decision was to introduce a new career system for categories B and C employees with effect from 1 January 1999. The process involved the evaluation of posts and a subsequent harmonisation exercise which ended in June/July 2004. By letter dated 3 November 2004, the Principal Director of Personnel explained to the complainant how his grade evaluation process was carried out and the results. That letter confirmed the classification of the complainant's post in grade group B5/B1.

3. Following a reassessment exercise by the JGEP the complainant was informed, by letter dated 17 July 2006, that the JGEP confirmed his post in grade group B5/B1. In a note dated 15 December 2006, the Principal Director of Personnel informed grades B and C staff that the review process was completed. After further exchanges between the Administration and the complainant, he filed his internal appeal against the decisions and assessments of 3 November 2004 and 15 December 2006. His claim was reformulated in an e-mail dated 5 April 2009. Eventually, the IAC issued its opinion on 10 February 2010 in which the majority dismissed the appeal as unfounded. The minority, however, recommended that the complainant's appeal should be allowed in respect to his Brand Manager post, which should be classified within the B6/B4 grade group. It is seen that, by the impugned decision dated 12 April 2010, the President of the EPO accepted the recommendation made by the majority.

4. In addition to seeking to have the impugned decision set aside, the complainant is requesting the Tribunal to order that his Brand Manager post be classified within B6/B4 grade group from

2000. He seeks a full disclosure of details of the assessment by the JGEP. He also seeks material and moral damages and costs.

5. In challenging the classification of his post as Brand Manager in the grade group B5/B1, the complainant insists that the post should have been classified within the B6/B4 grade group with effect from 2000. He asserts that there was inadequate disclosure of the full details of the JGEP's assessment. He argues that the assessment procedure that was carried out by external consultants and applied internally by the JGEP was fatally flawed from the outset, improperly performed and wrong in its conclusions. He also argues that the assessment was subjective, *ad personam*, and contrary to the Service Regulations.

6. This is a convenient juncture at which to draw upon the basic applicable principles for the present case. The Tribunal has consistently confirmed that an evaluation or classification exercise is based on the technical judgement to be made by those whose training and experience equip them for that task. It is subject to only limited review. The Tribunal cannot, in particular, substitute its own assessment for that of the organisation. Such a decision cannot be set aside unless it was taken without authority, shows some formal or procedural flaw or a mistake of fact or of law, overlooks some material fact, draws clearly mistaken conclusions from the facts or is an abuse of authority (see, for example, Judgment 2581).

7. Before the Tribunal, the complainant bases his case that the evaluation process was fatally flawed in relation to his post on the following five main grounds:

1. The on-loan assignment process, as it applied to him, was not a genuine process because the proper procedures were not followed and led to a flawed evaluation of his post.
2. The actual methodology by which the assessment was done introduced requirements that were not in line with the Service Regulations.

3. The evaluation of his post was flawed.
4. The evaluation process was flawed because of lack of transparency and the failure to disclose information.
5. There were major inconsistencies in the evidence provided by the Office and in the way in which the IAC interpreted it as to substance and procedural propriety.

8. Of these grounds, ground one is not material to the matter that is before the Tribunal.

9. In ground two, the complainant seeks to impeach the very legal basis of the methodology by which the evaluation was done. He argues that the methodology was contrary to the Service Regulations. He premises this mainly on the argument that the mandate of the evaluators was to “evaluate the grading of jobs in the B and C categories in accordance with the factor based methodology as adopted by the EPO”. The complainant maintains that his post was assigned in breach of the Service Regulations because it was not published, had a defective probationary process, did not have a job specification, and had a grading that was no more than a previous grading in a different and dissimilar post. He further argues that the consultants simply adopted the administrative faults of the Administration, which undermined the possibility of a proper evaluation. In effect, the complainant urges the Tribunal to conclude that, from these bases, any recommendation concerning the evaluation of his post was contrary to law because of these actions, which he alleged were contrary to the EPO Service Regulations. The Tribunal does not agree that these assertions can stand in relation to ground two. This ground of the complaint is unfounded.

10. In ground five, the complainant alleges that there was a major inconsistency in the evidence provided by the EPO, and, additionally, the way in which the IAC handled and interpreted that inconsistent information is highly questionable as to substance and proper procedure. The complainant referred to evidence which his line

manager gave in his interview before the JGEP. In the view of the Tribunal it was for the JGEP to determine how to use that evidence. The JGEP stated, in effect, that in the interview, the line manager did not disagree with the information which the complainant wrote in his questionnaire. The Tribunal considers that this evidence by the line manager had no impact on the evaluation process in the absence of proof that it did, which the complainant bears the burden to provide. Accordingly, the challenge on ground five is also unfounded.

11. As far as ground four is concerned, the Tribunal notes that in the initial stages of the evaluation exercise the Administration refused to disclose personal information relating to the complainant and others on the ground of confidentiality. It did not at one stage disclose information on the scores which staff received for reasons of data and personal protection. The Tribunal considers that notwithstanding these concerns, it was necessary to disclose in writing personal information on the evaluation, particularly concerning why a certain score was obtained, to an individual whose post was evaluated when a request was made for that information. The Tribunal notes the EPO's statement that it had otherwise disclosed a plentiful supply of information about the evaluation process on a constant basis. The Tribunal is satisfied that there was eventual reasonable disclosure of information in keeping with the Organisation's duty to disclose and to ensure transparency. The Tribunal does not consider that it was necessary to disclose the minutes of the meetings of the JGEP. Accordingly, the challenge on ground four is also unfounded.

12. In ground three, the complainant seeks to impeach the application of the evaluation methodology to his post on grounds that are similar to those pursued in the internal appeal.

13. The majority of the IAC concluded that the classification of the Brand Manager post within the B5/B1 grade group was done on objective evaluation that was performed in accordance with the relevant Service Regulations. The majority of the IAC arrived at this conclusion by finding, first, that that evaluation was based on a

plentiful supply of information some of which the complainant submitted in his questionnaire and in meeting with his line manager who confirmed that information. The majority of the IAC accepted the statement by the Administration that the external consultants were selected by way of a tender process, and executed their mandate quite professionally. Additionally, the majority accepted that the members of the JGEP were trained and their work was audited, which guaranteed an objective evaluation. The minority of the IAC recommended that the complainant's post be placed in the B6/B4 grade group because there were flaws in the application of the evaluation methodology but for which it would have been so placed.

14. Before the Tribunal, the complainant repeats his claim that the absence of specification for the Brand Manager post resulted in a flawed evaluation of his post. He further complains that the evaluation provided a simplistic view of his organisational and resource management responsibilities, thereby underestimating his qualifications. He also referred to his level of autonomy, his external interaction and his internal interactions with his supervisors and his well-developed language skills.

15. The Tribunal notes that the majority of the IAC held that their examination of the details of the points allocated to each of the ten evaluating factors employed in the process confirmed the appropriateness of the methodology as well as its application to evaluate the complainant's post. They found that the Brand Manager post does not require such a degree of expertise that the application of the ten factor-based methodology would not have provided a true overall value to evaluate all B and C category posts.

16. It is however noteworthy that the majority of the IAC referred to the inability of the methodology to deal with some situations in the B5/B1 grade group even though the duties attached to those posts required the holder to have some post-secondary training or equivalent experience/technical expertise. The majority of the IAC concluded from this that the methodology could not do sufficient

justice to the specific expertise attached to a post which corresponded more closely to the B6/B4 grade group. Notwithstanding this observation, the majority of the IAC concluded that neither the methodology nor the application of it to the complainant's post was fatally flawed so as to provide a ground for setting aside the evaluation. According to the majority of the IAC, this was because, first, details of the number of points allocated did not show any obvious errors in the appraisal of the facts. Second, because the IAC would not substitute its own assessment in the face of the discretionary power which attaches to the evaluation process and the work of the consultants, the Harmonisation Committee and the JGEP.

17. This is a very critical aspect of the complaint because it was the point of departure between the majority recommendations, which the President accepted, and the minority recommendation to classify the "brand manager" post to the B6/B4 grade group, which he did not accept.

18. The minority concluded, on two grounds, that there was an incorrect application of the methodology that caused the complainant's post to be placed in the B5/B1 rather than in the B6/B4 grade group. Their first ground was that there was a distortion in the application of the values of the ten evaluating factors by the JGEP. The result, according to the minority, was that notwithstanding that each evaluating factor carried a maximum of 400 points and a possible overall maximum of 4,000 points, the distortion in the application of the methodology caused the possible maximum attainable in some cases to be about 3,800 points. This meant that, as applied in those instances, the mandate of the internal evaluators did not comply with their mandate to carry out the evaluation in accordance with the factor-based methodology as adopted by the EPO. This meant, in the view of the minority, that the JGEP applied an amended methodology without authority, which amounted to a procedural irregularity in some cases. The minority noted that the complainant's post was given an aggregate score of 2,900 points, but opined that without the distortion in the application of the methodology, the score for the post would have been

at least 3,000. This latter score would have put the post in the B6/B4 grade group.

19. In the second place, the minority found that the decision by the JGEP to confirm the post in the B5/B1 grade group was tainted and should be set aside. This, the minority stated, was because the JGEP overlooked essential facts and drew mistaken conclusions from the relevant facts in its evaluation of that post in a number of instances. In its view, one such instance related to the budget management aspect of the post. In this regard, the minority noted that under the item “Key Dimensions” in the role profile established after the external consultants’ evaluation, the Brand Manager post is described as involving the management of a considerable budget. The details indicate that the post requires the management of a formally allocated budget, including justification, monitoring and control of expenditure/resources, with full awareness of the financial impact of any action. The minority therefore took this to be a key element for the post, but felt that the relevant level of budget responsibility was not fairly reflected in evaluation factor 7 (Resource Management) because it was only awarded 200 points. It was pegged at level 2. In their view that aspect of the evaluation for the complainant’s post should have been placed at level 3 and awarded 300 points. The post would then have obtained an aggregate of 3,000 points which would have placed it in the B6/B4 grade group.

20. The minority also found that the JGEP overlooked essential facts and drew mistaken conclusions from the relevant facts because the post involved significant training duties, the holder was required to have highly frequent contacts with external companies and bodies, and the administrative duties which the office holder is required to perform are in a highly specialised field of work. The minority noted that the Tribunal in an earlier case highlighted the frequency of contact that a person in the latter grade group is required to have with outside bodies, which a person in a grade B5/B1 post is not required to have. The minority also noted that the Brand Manager post was in a very specialised field in which an office holder performs

semi-autonomously, which on the Tribunal's statement is the hallmark of a post in the B6/B4 grade group. On the other hand, a person in a grade group B5/B1 post performs administrative duties in a broad field of work.

21. The Tribunal considers that the different findings by the majority and the minority are based on technical aspects of evaluation and assessment, which fell within the technical experience, expertise and competence of those who carried out the assessment. The Tribunal does not discern a tainting illegality on any of the arguments raised on ground three, nor in the complainant's further assertion that the evaluation did not take into account the "event manager" duties that he performed since 2002 on a 50 per cent basis when the "event manager" post was in the B6/B4 grade group from 2005. That would have provided a classic evaluation *ad personam* not focusing on the post by rendering the classification of the Brand Manager post referable to duties which he performed in another post. The Tribunal finds that the methodology applied to the evaluation of the complainant's post was not tainted to render the evaluation arbitrary and *ad personam*. It appears to the Tribunal that the EPO took reasonable steps to conduct a fair classification exercise. The facts suggest that the experts essentially focused on the evaluation of the complainant's post.

22. Accordingly, ground three of the complaint is also unfounded.

23. For all of the foregoing reasons, the President of the EPO did not err by following the recommendation of the majority of the IAC. Accordingly, the complaint is dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed in its entirety.

In witness of this judgment, adopted on 8 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Dolores M. Hansen
Hugh A. Rawlins
Catherine Comtet