K.

v.

EPO

131st Session **Judgment No. 4397**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Ms H. K. against the European Patent Organisation (EPO) on 23 April 2019, the EPO's reply of 8 August, the complainant's rejoinder of 16 December 2019 and the EPO's surrejoinder of 9 April 2020;

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

Having examined the written submissions;

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

The complainant challenges the decision to transfer her.

At the material time, the complainant was employed as an Administrator within Directorate 5.1.1 in the EPO's sub-office in Vienna (Austria). She was also an elected staff representative of the Local Staff Committee. On 13 October 2014 her supervisor informed her by phone that she would shortly be assigned new tasks and duties in another Department. On 20 November she took part in a meeting where "the planned changes to her tasks and her organisational allocation" were discussed. By letter dated 1 December 2014, the complainant was informed that, in the interest of the Organisation, she would be "reallocated" as Administrator to Directorate 5.4.2 but that her grade and step would not be affected. She was provided with a new job specification.

On 26 February 2015 the complainant requested a review of this decision, arguing that it was taken without legal basis, that it was adopted without consultation of the staff representation and that it offended her dignity. As her request was rejected on 23 April, she lodged an internal appeal with the Appeals Committee on 13 July 2015 asking for the setting aside of the 23 April decision, her immediate reinstatement to her former position and the award of moral damages and costs.

The complainant was reassigned to a sub-unit of Directorate 5.4.2 with effect from 1 March 2016.

The Appeals Committee heard the parties on 11 June 2018 without the complainant's attorney being present. During the hearing, the presiding member of the Committee's chamber invited the Administration to investigate whether it would be possible to offer the complainant a position in Munich (Germany) in line with her former tasks and duties, as part of settlement negotiations. The Administration replied negatively. On 3 August 2018, the complainant applied for early retirement as from 1 March 2019.

The Appeals Committee issued its opinion on 26 November 2018. It unanimously recommended to dismiss the appeal as unfounded in its entirety and to award the complainant 150 euros in moral damages for the length of the procedure. By a letter of 25 January 2019, which constitutes the impugned decision, the complainant was informed that the President of the European Patent Office, the EPO's secretariat, had decided to endorse the Appeals Committee's recommendations.

The complainant asks the Tribunal to quash the impugned decision and to award her material damages for the loss of income she suffered between 1 March 2019 – the date on which her early retirement took effect – and 1 March 2021, when she would have reached the regular retirement age, and as compensation for the reduction of her pension by 14 per cent. She also claims moral damages in a total amount of 45,000 euros under several heads. She further asks the Tribunal to grant her interest at the rate of 5 per cent per annum on all amounts awarded. Finally, she seeks an award of costs for the internal appeal proceedings and the proceedings before the Tribunal and such other relief as the Tribunal deems necessary, appropriate and equitable.

The EPO raises a "strong doubt" as regards the complainant's cause of action to challenge her "reassignment" and considers that the claim for material damages lacks basic substantiation and amounts to a new

claim, which is unrelated to the scope of the present dispute. It therefore asks the Tribunal to dismiss the complaint as partly irreceivable and unfounded in its entirety.

CONSIDERATIONS

1. The complainant was transferred from a post of Administrator within Directorate 5.1.1 in Vienna to a post of Administrator within Directorate 5.4.2 also in Vienna, with effect from 1 December 2014. By letter dated 26 February 2015, she requested a review of that decision on the grounds that it lacked legal basis, that the staff representation was not consulted and that it offended her dignity. Her request for review was rejected by letter dated 23 April 2015. She lodged her internal appeal on 13 July 2015 against the 23 April decision regarding "the reallocation of [her] post and reassignment of tasks", asking that the decision be quashed, that she be immediately reinstated to her previous position within Directorate 5.1.1 and that she be awarded moral damages and costs. In the present complaint, the complainant impugns the President's 25 January 2019 decision to endorse the unanimous recommendations of the Appeals Committee to dismiss her 13 July 2015 internal appeal as unfounded in its entirety and to award her 150 euros in moral damages for the length of the procedure.

2. In its unanimous opinion of 26 November 2018, the Appeals Committee recommended "that the appeal be rejected as it could not find any fault in the way the President applied the relevant rules and principles". In analyzing the merits, the Appeals Committee considered that "[e]ven though the dispute seem[ed] to revolve around the question of the nature of the Office's decision of 23 April 2015, transfer or reassignment, the essential question [was] rather whether the Office's decision was carried out within the limits of its discretionary power. More specifically the central question [was] whether, in the exercise of the discretionary power it enjoyed, the Office complied with its duty to provide the [complainant] with work of the same level as that which was performed in the former post and matching her grade and qualifications."

3. In its reasoning, the Appeals Committee stated inter alia that "the legal basis for restructuring decisions [is] not to be found exclusively in the [Service Regulations] but can be validly found in other legal

instruments making up the legal framework of the EPO, such as the [European Patent Convention] or the relevant case law of the [Tribunal]". It went on to cite Judgments 1146, consideration 4, regarding rotation as a management tool; 2510, consideration 10, regarding restructuring and redeployment of staff; 3373, consideration 8, regarding the executive authority to assign staff to different posts; and 2562, consideration 12, regarding the changes in the staff's duties. It found that it could be inferred from those judgments that "the Office enjoyed a discretionary power to take restructuring decisions such as reassignment and reallocation measures, even though the said measures were not specifically foreseen in the [Service Regulations]. Conversely, the fact that the [Service Regulations] only mentioned transfer measures did not entail that all restructuring measures were transfer decisions." It considered that the nature of restructuring decisions depends on the circumstances of the case. It went on to state that "given that the [complainant] was assigned to a post in [Directorate] 5.4.2 without competition, and that her reassignment was not intended to fill a vacant post but rather to accommodate [her] wish to remain posted in Vienna for *'personal reasons'* [...], the said measure [was] a measure of redeployment rather than a transfer. By way of consequence, the procedural requirements pertaining to transfer decisions in application of Articles 12(2) and 4(2) [of the Service Regulations] and [of Tribunal's Judgment] 2920 [considerations] 4 and 7 [were] not applicable to the Office's decision of 23 April 2015."

4. With regard to the complainant's assertions regarding the EPO's failure to comply with its duty of care, in that it omitted to "take into account the interests and dignity of the staff member, including the provision of work of the same level as that which was performed in the former post and matching the staff member's qualifications", the Appeals Committee found that her new duties were indeed different from those she performed in her previous post. Specifically, it found that "[i]t [was] undisputed that the duties and responsibilities [were] different in nature; however, the [complainant] [did] not have an acquired right to retain the same duties and the said difference in nature [did] not in itself provide evidence of a difference in the levels of duties". It unanimously concluded that the Office duly took into consideration the complainant's dignity and interests, as required by the Tribunal's case law. It did not find that the complainant's "reassignment" constituted in fact a hidden sanction or a discriminatory treatment and concluded that

there was no violation of her dignity. However, the Appeals Committee found that the delay in the internal proceedings was unreasonable and solely attributable to the Office. Consequently, it recommended that 150 euros be granted to the complainant.

5. The complainant challenges the 25 January 2019 decision, confirming the 1 December 2014 previous decision, on the following grounds:

(a) it was based on a procedurally flawed internal appeal procedure;

(b) the two decisions lacked legal basis;

(c) the 1 December 2014 decision was taken in breach of her right to be heard or consulted properly and was discriminatory;

(d) it violated her dignity as the work assigned to her was not equal to the tasks she had been assigned in her previous post and was not commensurate with her qualifications and experience; and

(e) it constituted a hidden retaliatory sanction against her for her candidature and election to the Local Staff Committee.

6. The complainant requests an oral hearing on the ground that "all of the facts relevant to a just settlement of the case cannot be clarified in a satisfactory manner by means of the written procedure". The request is rejected as the Tribunal considers that the materials which the parties have provided are sufficient to enable it to render an informed decision on the case.

7. The Organisation challenges the receivability of the complaint insofar as the "reassignment" was based on the complainant's wish to remain in Vienna. It also contests the receivability of the complainant's request for material damages regarding her decision to apply for early retirement due to her situation at work. It asks the Tribunal to dismiss her ancillary claims for moral damages and costs, as well as her request for an oral hearing.

8. The complaint is receivable. The fact that the EPO was attempting to satisfy the complainant's wish to remain in Vienna does not prevent her from contesting the resulting decision by which she was transferred to the specific post of Administrator within Directorate 5.4.2.

9. The complainant asserts that the internal appeal procedure was procedurally flawed as the principle of equality of arms was not respected when the presiding member of the Appeals Committee chamber refused to postpone the hearing as a "purely arbitrary measure". This assertion is unfounded. Article 7(6) of the Implementing Rules for Articles 106 to 113 of the Service Regulations, entitled "Internal appeal procedure", provides that "[t]he parties may be represented or assisted by persons of their choice". Rule 11(9) of the Rules of Procedure of the Appeals Committee provides that "[t]he presiding member of the relevant chamber may decide to change the date of a hearing only for compelling reasons, which shall be communicated to the parties". By letter of 18 May 2018, the Appeals Committee's Secretariat informed the complainant's attorney that the hearing was scheduled for 11 June 2018. On 22 May the complainant's attorney requested to postpone the hearing due to the fact that she would be away on vacation from 10 to 18 June. The presiding member of the chamber decided to maintain the hearing as it could not be postponed for other than compelling reasons. The Tribunal finds that the decision not to postpone the hearing was a proper exercise of the discretionary power provided in Rule 11(9) of the Rules of Procedure of the Appeals Committee. The finding that a vacation was not considered to be a compelling reason warranting postponement of the hearing, in the present case, cannot be considered unreasonable nor arbitrary.

10. The claim that the 25 January 2019 decision, as well as the decision communicated by letter of 1 December 2014, lacked legal basis is well founded. The Organisation relied on its general power to restructure its services to justify the complainant's "reassignment", citing the Appeals Committee's finding that "the legal basis for restructuring decisions [is] not to be found exclusively in the [Service Regulations] but can be validly found in other legal instruments making up the legal framework of the EPO". The Organisation notes that the Tribunal's case law forms part of its legal framework. However, the Tribunal's consistent case law holds that "any authority is bound by the rules it has itself issued until it amends, suspends or repeals them. The general principle is that rules govern only what is to happen henceforth, and it is binding on any authority since it affords the basis for relations between the parties in law. Furthermore, a rule is enforceable only from the date on which it is brought to the notice of those to whom it applies (see Judgment 963,

under 5). A competent body adopts rules in order to regulate its exercise of discretionary power in making specific decisions. It would radically contrast with the finality and essence of a rule (which is by nature general and abstract) to allow that in making a decision the authority can disregard a rule that was adopted in order to limit the authorities' power concerning particular subjects and instead create an opportunity for expanding one's power. Obviously, the procedure to adopt rules must be different from the procedure to make decisions, because rules are general and apply to many (undefined) and therefore must be published accordingly, whereas decisions are more precise and apply to few (defined)" (see Judgment 2575, consideration 6).

11. In stating that "the legal basis for restructuring decisions [is] not to be found exclusively in the [Service Regulations]", the Appeals Committee misinterpreted the Tribunal's case law. While it is true that, in taking restructuring decisions, the executive head can also rely on some well-established principles enshrined in the case law (see, for example, Judgments 4086, consideration 11, 3488, consideration 3, and 2839, consideration 11), she or he is bound by the proper application of the relevant provisions in force. In the present case, the Organisation erred in not following the provisions in force at the time the 1 December 2014 decision was taken, when it created a new post without advertising the vacancy. Specifically, the Organisation should have applied Article 12(2) of the Service Regulations, which provides that "[a] permanent employee may be transferred within the Office either on the initiative of the appointing authority or at his own request to a vacant post which corresponds to his grade", in conjunction with Article 4(2), which provides that "[t]he staff shall be informed of each vacant post when the appointing authority decides that the post is to be filled". The proper application of these provisions may have led to a different conclusion.

12. The Organisation's assertion that the impugned decision was lawful as it was based on its general power to restructure its services, in its generality, is not acceptable. The Organisation's wide discretion still requires it to be exercised within the limits of the general principles of law and the existing provisions; otherwise, it becomes a way to circumvent the provisions in force, leading to arbitrariness. At the time the 1 December 2014 decision was taken, there was no provision in the Service Regulations which allowed the EPO to reassign an employee,

together with her or his post, to duties corresponding to her or his grade, or which allowed the EPO to create and fill a new post without following the provisions regarding transfers and creation of posts. It is clear from the subsequent creation and implementation of a new provision that there was a lacuna in the Service Regulations with regard to reassignment. In order to fill that lacuna, as from 1 January 2015, Article 11a, entitled "Reassignment", was inserted in the Service Regulations by the Administrative Council's decision CA/D 10/14 of 11 December 2014 introducing a new career system. Article 11a provides that "[i]n the interests of the service, the appointing authority may reassign an employee, together with his post, to duties corresponding to his grade".

13. The complainant requests material damages related to her early retirement following the Organisation's rejection of an amicable settlement on the basis that she retired under duress, stemming from the need to "carry out tasks far below her level of skills and qualification". The complainant was reassigned to a sub-unit of Directorate 5.4.2 with effect from 1 March 2016. Her assertion that her tasks remained largely the same as with her previous post of Administrator within Directorate 5.4.2 does not overcome the fact that she did not contest the 1 March 2016 reassignment, which was a new decision, and has since become immune from challenge. Thus, this request and all its consequent pleas and claims related to medical issues fall outside the scope of the present complaint and are irreceivable for failure to exhaust the internal means of redress.

14. The complainant argues that the 1 December 2014 decision, confirmed by the impugned decision, was taken in breach of her right to be heard or consulted properly so as to find alternative solutions to the disputed transfer; violated her dignity as the work assigned to her was not equal to the tasks she had been assigned in her previous post and was not commensurate with her qualifications and experience; was discriminatory; and constituted a hidden retaliatory sanction against her for her candidature and election to the Local Staff Committee. The evidence provided does not support the complainant's assertions. As stated in the Appeals Committee's 26 November 2018 opinion, "[i]t [was] undisputed that the duties and responsibilities [were] different in nature; however, the [complainant] [did] not have an acquired right to

retain the same duties and the said difference in nature [did] not in itself provide evidence of a difference in the levels of duties. [...] While it is true that the [complainant] expressed a clear preference for duties of a political and budgetary nature, it is less obvious that her duties reflect[ed] a difference of levels in terms of adequation to her former post, her grade [...] and qualifications." The Appeals Committee unanimously found that the complainant failed to provide evidence of discriminatory treatment or that the decision was in fact a possible hidden retaliatory sanction. It also unanimously concluded that there was no violation of the complainant's dignity. The Tribunal finds the Appeals Committee's above-cited conclusions to be persuasive.

15. With regard to the argument that the complainant had not been properly heard nor consulted, the Appeals Committee noted that "the circumstances of the file show that [she] was approached on the matter of her reallocation as a 'site-related solitaire' on different occasions: initially in 2013 and successively on 13 and 14 October 2014, 20 November 2014 and 1 December 2014. On these various occasions, [...] the Office explained the rationale behind its intention to dissolve site-related solitaires and islands. She was informed through various channels: telephone conversation, emails, formal meeting, letter." The Appeals Committee correctly found that the EPO had complied with its obligation to consult the complainant and to state reasons for the transfer. In support of her allegation that the 1 December 2014 decision was a hidden retaliatory sanction, the complainant says that it was taken just one year after the agreement was made for her to stay in Vienna and a few months after she had been elected to the Local Staff Committee. She also says that she was the only staff member who was removed from her initial "unit" and "reassigned" completely different tasks and that two other "solitaires" staff members were treated differently. She cited "strained and conflictual" relations between the EPO management and the staff committees, concluding that "the EPO management did not wish to keep a staff representative in a position, where he or she had an insider view on co-operation activities, the use of the respective budget and close contacts to high level officials in national offices of the [M]ember [S]tates". The complainant's submissions do not prove that her transfer was a hidden retaliatory sanction.

16. In light of the above considerations, the Tribunal concludes that the 25 January 2019 decision is flawed and must be set aside, as well as the 1 December 2014 transfer decision, which was not taken in conformity with the relevant provisions in force at the time. The complainant's claims regarding a flawed internal appeal procedure, violation of her dignity, discriminatory treatment and a hidden retaliatory sanction are not supported by the evidence and will be dismissed. The flaw in the 1 December 2014 decision, confirmed in the impugned decision, did not cause any material damage to the complainant and, accordingly, their setting aside does not entitle her to any award of material damages. The length of the internal appeal procedure, from the complainant's appeal of 13 July 2015 to the final decision of 25 January 2019, was excessive and caused the complainant distress. Considering the fact that the transfer decision was in effect only for 15 months (from 1 December 2014 to 1 March 2016), the nature of the recognized flaw, the fact that most of the complainant's arguments are unfounded and the amount already received for the excessive length of the internal appeal procedure, the complainant is entitled to receive a total award of 10,000 euros in moral damages. As the complainant succeeds in part, she is entitled to costs for which the Tribunal will award 4,000 euros.

DECISION

For the above reasons,

1. The 25 January 2019 and 1 December 2014 decisions are set aside.
2. The EPO shall pay the complainant moral damages in the amount of 10,000 euros.
3. It shall also pay the complainant 4,000 euros costs.
4. All other claims are dismissed.

In witness of this judgment, adopted on 25 March 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 14 April 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ