

**K. (No. 3)**

**v.**

**EPO**

**135th Session**

**Judgment No. 4640**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr T. K. against the European Patent Organisation (EPO) on 21 November 2012, corrected on 10, 14 and 22 May 2013, the EPO's reply of 2 October 2013, corrected on 3 October, the complainant's rejoinder of 25 February 2014 and the EPO's surrejoinder of 5 June 2014;

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 a series of management acts regarding his administrative status.

The complainant joined the European Patent Office, the EPO's secretariat, on 1 June 1991 as an administrative employee at grade B3. At the material time he held grade B5. As of 1 October 2000 the complainant was detached for a maximum period of three years to the Epoline Directorate. According to his staff report for the reporting period 2002-2003, the complainant was assuming the "main original duty" of Brand Manager but, as of mid-2001, he "took up voluntarily as a second main duty that of [E]vent [M]anager". The complainant's "on-loan" status was extended until 31 December 2005 and was further

extended in 2006 until further notice. As of 1 November 2006, the complainant was assigned to the position of Application Manager.

In September 2007 the complainant contested his staff report for the period 2006-2007. After pursuing an unsuccessful conciliation procedure throughout 2008 and 2009, the complainant lodged internal appeal RI/122/09 on 21 July 2009 stating that his 2006-2007 staff report had not been completed within the time limit set out in the relevant provisions. He also alleged that the Office had acted unlawfully by not giving him job specifications, job classification or evaluating his career grade group for any post he had held since he was placed on loan in October 2000. On 22 July 2009 the Vice-President of Directorate-General 2 (DG2) decided to set aside the complainant's 2006-2007 staff report and further stated in a letter dated 7 August 2009 that a new version would be prepared without the involvement of his then line manager, whom the complainant had accused of harassment in separate proceedings.

On 20 October 2009 the complainant lodged internal appeal RI/167/09, in which he mainly challenged the decision of 7 August 2009 of the Vice-President of DG2 to close the investigation regarding the conduct of his line manager, but also reiterated his allegations concerning his 2006-2007 staff report and the Office's failure to provide a job description or job classification for the posts he had held since October 2000.

On 18 November 2009 the complainant requested clarifications on his administrative status. Having received no reply, he lodged an internal appeal on 10 February 2010 contending that there were several inconsistencies, failures and shortcomings arising from his detachment as of October 2000. He also claimed unequal treatment with regard to his former post of Application Manager, which had been advertised in a higher grade-group after he had left that position, and complained that his staff report for the period from June to September 2000 could not be found in his personal file. This appeal was registered as RI/24a/10.

By letter of 26 March 2010 the Human Resources (HR) clarified the complainant's administrative status, explaining that his post had been relocated to DG2 Application Management as of 1 March 2007,

while still on loan from Patent Administration, and then formally transferred to DG2 Application Management as of 1 October 2007.

By letter received by the complainant on 19 April 2010, he was informed that the President had decided to reject all of his claims raised in the letter of 10 February 2010 and to refer the matter to the Internal Appeals Committee (IAC) under the reference RI/24/10.

In April 2010 the Office introduced new generic job profiles and job titles for B/C grade staff and, as a result, the complainant's job title was changed to Software Applications Officer and his post remained classified in grade group B5/B1.

On 21 June 2010 the complainant lodged internal appeal RI/24b/10 contesting the letter of 26 March 2010 concerning his administrative status. He contended that the decisions to relocate and transfer his post were unlawful as he had not been consulted. He further challenged the Office's decision to employ him continuously on loan from October 2000 to March 2007 and contended that the procedures were not followed and that there was no supporting documentation in his personal file. He also contested the decision not to evaluate or change his career grade group at the time he took up the duties of Application Manager.

On 2 July 2010 the complainant lodged internal appeal RI/24c/10 challenging the decision to reject the claims raised in his letter of 10 February 2010. On 24 August and 2 September 2011 the complainant requested to be granted moral damages for the delay in processing his internal appeals (RI/122/09, RI/167/09, RI/24a/10, RI/24b/10, RI/24c/10).

After hearing the parties on 19 April 2012, the IAC issued its opinion on 13 July 2012, in which it considered jointly the complainant's five internal appeals. The IAC unanimously found that the Office had not discharged its duty of care and was responsible for several unlawful acts that had caused damage to the complainant. It concluded that the complainant was entitled to relief only in respect of damage suffered in connection with the establishment of the 2006-2007 staff report. It recommended the implementation of a set of practical measures as well as an award of damages and costs. It recommended dismissing the remaining claims.

By letter of 24 September 2012 the Vice-President of Directorate-General 4 (DG4), by delegation of power from the President, allowed in part the complainant's internal appeal. He decided that a job grade evaluation would be conducted with regard to the duties performed by the complainant as of 2006. He further stated that, based on that evaluation, it would be possible to determine his conclusive job title and to issue a job description as well as to assign him a reporting and a countersigning officer and review, if needed, the content of his 2006-2007 staff report. He decided to award a global compensation payment of 8,000 euros as well as costs. He concluded that all other claims related to the situation prior to November 2006 were rejected as irreceivable and that the Office would endeavour to ensure that his personal file sufficiently reflected the tasks carried out since 2000. That is the impugned decision in the present proceedings.

By letter of 2 May 2013 the complainant was notified of the interim results of the job grade evaluation of the duties he had performed since November 2006, which indicated that his post should be classified at expert level and assigned to grade group B6/B4, and that the characteristics of his post did not correspond to those of an Administrator in "A-grade career". He was also informed that a further evaluation of his grading within "B-grade career" would follow in order to reach a final conclusion on his job grade. The complainant challenged that decision in a complaint which is the subject of Judgment 4641, also delivered in public this day.

The complainant asks the Tribunal to set aside the impugned decision of 24 September 2012. He seeks a proper objective evaluation of the grading of the tasks he performed and the conduct of an objective performance evaluation resulting in the issuance of a proper staff report for the periods from 1 January 2006 onwards. To that end, he asks for the allocation of a reporting and a countersigning officer. The complainant requests a retroactive upgrading to grade A2 in career group A4/1 in relation to his post of Brand Manager occupied as of 2004 and to the position of Application Manager occupied as of 1 November 2006. He also asks for the payment of all salary losses incurred with interest. He seeks the payment of 10,000 euros for material damages and 225,000 euros for moral damages due to the multiple breaches of law

and the injury to his health and career. The complainant further requests the award of punitive damages in the amount of 20,000 euros as well as costs for the internal appeal procedure and for the procedure before the Tribunal.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable and otherwise unfounded.

### CONSIDERATIONS

1. The complainant requests the Tribunal to order the production of his personal file. The request is rejected as the file is unnecessary for the determination of the issues raised in this complaint.

2. The facts reveal the unresolved issues concerning the complainant's employment status in the EPO both prior to and after 2006. They also show the consequent litigation the complainant initiated to have his administrative situation in the EPO clarified on the basis that it affected matters including his job grading, titles and specifications, the assignment of his reporting and countersigning officers and his staff reports. His various requests for review culminated in a number of internal appeals (referred to in the facts) which the IAC considered in its 13 July 2012 report. The complainant filed this complaint on 21 November 2012 impugning the decisions contained in the letter dated 24 September 2012, which he received on 16 October 2012. In the impugned decision, taken by delegation of power, the Vice-President of DG4 informed the complainant of his decision to accept the IAC's recommendations in part. The complaint is therefore directed against the express decision of 24 September 2012 and not the implied rejection of all of the IAC's recommendations as the complainant suggests.

3. In order to properly consider irreceivability which the EPO raises as a threshold issue, the Tribunal finds it convenient to detail the relevant conclusions and recommendations contained in the IAC's report and the acceptance or rejection of them in the impugned decision.

4. In its report, the IAC concluded that the Office did not discharge its duty of care to the complainant and was responsible for unlawful acts that caused him damage. It however stated that for reasons concerning admissibility of his claims, the complainant was entitled to relief only for damage he suffered in connection with the establishment of his staff report for February 2006 to 2007 or for subsequent events that were challenged in a timely manner. The IAC accordingly recommended that the complainant be compensated for the Office's failure "to submit the disputed staff report in a timely and correct manner". For this, the majority recommended that the complainant be paid 100 euros per month starting on 1 October 2009 until the staff report was validly countersigned following a proper procedure. The minority of the IAC recommended that he be paid 1,000 euros for each year, or part thereof, of delay from 1 January 2010.

The IAC also unanimously concluded that the Office was grossly negligent for the complainant's uncertain and unclear administrative situation. It recommended awarding him 2,000 euros per year from 1 November 2006 until his administrative position was properly established, that is until the assessment of his post has been correctly done and he is given a proper job title. Additionally, the majority of the IAC members concluded that the Office's gross negligence bordered on recklessness. Taking into account the pain and suffering he sustained for this and the egregious nature of the Office's inaction, they recommended that the complainant be paid 10,000 euros moral damages. The IAC however unanimously considered that compensation for the length of the internal procedure was covered by the relief recommended. Further concluding that the Office's negligence was such that the complainant should be offered equitable relief, the IAC unanimously recommended granting his claim for an order that the comments he made during the conciliation procedure be acknowledged and that the staff report be redrafted with the classification of the post he held at the material time, or that a document be placed in his personal file to explain the situation. The IAC also recommended that a document be placed in the complainant's personal file acknowledging the tasks he carried out between 2000-2006 so that he would not suffer injury in respect of possible promotion and/or career advancement.

5. The IAC further recommended that the EPO should take the following practical measures which were likely to put an end to the complainant's many procedures:

- (a) Clarify his administrative position, including a list of the tasks he performed, in order to designate the most appropriate reporting and countersigning officers.
- (b) Forthwith issue job descriptions/specifications for his Application Manager post.
- (c) Carefully and lawfully assess the post which he held as of 1 November 2006, in terms of the level of the duties he performed, as there were "strong indicators" that he performed tasks of a higher level than grade group B5/B1 and that other Application Manager posts were classified in the A category but that if the level of the complainant's duties did not correspond to A level it should be determined whether they correspond to grade group B6/B4. The consequences of the assessment, in terms of promotion, the payment of salary arrears, with interest should follow.
- (d) The complainant's post should be given the appropriate job title following the recommended assessment.
- (e) The complainant's 2006-2007 staff report should then be amended accordingly, with the tasks he performed taken into consideration because there was no job description/specification and no "inappropriate staff members" should be involved in the process.

6. The IAC also concluded that all the complainant's other claims, including the following, were moot or could be dismissed:

- (i) his claims to declare that the functions he performed were of a certain grade;
- (ii) his claim for moral damages and other relief for mobbing and harassment related to events that pre-dated 1 November 2006 as they were time-barred;
- (iii) his claim for moral damages for derogatory remarks, which, in effect, was not proved; and

- (iv) other pecuniary claims he made which overlapped in his various internal appeals or were unclear.

7. In the 24 September 2012 letter, the Vice-President of DG4 agreed with the IAC's recommendations as follows:

- (1) To have an evaluation of the job the complainant performed from November 2006 conducted. The evaluation was to be carried out by the Controlling Office and was to be followed, if necessary, by a further evaluation by the Job Grade Evaluation Panel. The complainant was required, in consultation with his line managers, to complete a functional analysis of the tasks he performed during the subject period.
- (2) A conclusive job specification and job title, based on the evaluation exercise, were to be issued and placed on the complainant's personal file.
- (3) The issue concerning the complainant's reporting and countersigning officers was to be resolved, subsequently, and, if needed, the content of his staff report for the 2006-2007 reporting period was to be reviewed.
- (4) HR was required to provide further clarification of the history of the complainant's administrative status. The letter however noted that relevant basic data was provided to the complainant on 26 March 2010.

8. Regarding the IAC recommendation that the EPO should pay the complainant compensation, the Vice-President of DG4 agreed to pay him a global sum of 8,000 euros. In so doing, he:

- (1) Endorsed the recommendation by the minority of the IAC members to compensate him for the delay in producing his 2006-2007 staff report in the sum of 1,000 euros for each year of the delay until that report was countersigned on 3 April 2012, stating that it was in line with the result in a similar appeal: RI/119/05;



- (2) Endorsed the recommendation by the minority of the IAC members to pay the complainant 2,000 euros damages for each year but limited to the period from 2010 to the finalization of his job grade evaluation, “which [was] reasonably expected to take place until the end of 2012”, and not from 1 November 2006 as the IAC had recommended. The Tribunal however notes that this was the unanimous recommendation of the IAC;
- (3) Endorsed the IAC’s recommendation (and pursuant to Article 113(7) of the Service Regulations) to reimburse the complainant’s reasonable legal costs incurred in the internal appeal proceedings on his submission of the relevant invoices;
- (4) Rejected the recommendation by the majority of the IAC to pay the complainant a further 10,000 euros compensation on the basis that the Office’s actions regarding the clarification of his administrative status did not amount to gross negligence that bordered on recklessness;
- (5) Endorsed the IAC’s conclusion that all other claims relating to the complainant’s employment situation between 2000 and November 2006 were time-barred and therefore irreceivable.

9. The complainant contends that the EPO abused the detachment/on-loan procedure. He also argues that his staff report for the period January 2006 to February 2007 was not validly issued because of failure to comply with reporting guidelines and procedures due to confusion concerning his administrative status. He states that it was not clear whether he was on loan or not; who was his countersigning officer; against which job specification and duties was his performance assessed, and that the EPO lacked impartiality, objectivity and fairness. He also submits that his grade and duties were determined arbitrarily.

These are essentially repetitions of his submissions in the internal appeal, which the IAC accepted, recommending reassessments and re-evaluations following the guidelines reproduced in considerations 4 and 5, above. The Vice-President of DG4 endorsed the recommendations in the impugned decision. The complainant’s staff report for the period January 2006 to February 2007 was set aside in July 2009, and it

emerged from the impugned decision that the reassessment and re-evaluation of that report accordingly ensued.

With regard to the determination of his grade and duties, the Tribunal notes that the re-evaluation process culminated in a decision of 9 October 2013 which is the subject of an ongoing internal appeal procedure.

10. The complainant further submits that the EPO failed to implement its decisions contained in the 24 September 2012 letter, in that it did not carry out a proper objective evaluation of the grading of the tasks he performed and the conduct of an objective performance evaluation resulting in the issuance of proper staff reports for the periods from 2007 onwards. However, as noted in Judgment 4641 also delivered in public this day concerning his nineteenth complaint, the EPO has since taken steps to implement these decisions. Having regard to these subsequent events the central issue that remains to be determined in these proceedings is whether the complainant was granted adequate redress in the impugned decision.

11. It is relatively clear from the evidence that the EPO mismanaged the complainant's status and employment history in various ways. Notwithstanding that there is no evidence that this was done in bad faith, as the complainant argues, it was open to the IAC to conclude, as it unanimously did, that the Office was grossly negligent for the complainant's uncertain and unclear administrative situation. The IAC recommended that he be awarded 2,000 euros per year from 1 November 2006 until his administrative position was properly established. In the impugned decision, the Vice-President of DG4 in effect accepted this conclusion by agreeing to pay that amount, albeit limited to the period from 2010 and not from 1 November 2006 as the IAC had recommended. However, the Vice-President did not err as he properly motivated his decision to depart from this aspect of the recommendation.

The Tribunal also determines that the Vice-President of DG4 did not err when, in the impugned decision, he rejected the recommendation by the majority of the IAC to pay the complainant an additional 10,000 euros on the basis that the Office's gross negligence bordered on recklessness, which was not borne out by the evidence.

12. On the question of delay and remedy, the Vice-President of DG4 arguably was obliged to explain why he favoured the approach of the minority and did not favour the approach of the majority (see Judgments 4427, consideration 9, and 3161, consideration 7) and did not do so adequately. However, it is unnecessary to determine this conclusively because the complainant has failed to establish moral injury occasioned by the delay which would justify an amount exceeding the amount actually awarded.

13. The complainant's submission that the EPO breached the duty of care which it owed him in that it failed to protect his health and safety in all aspects related to his work is, in effect, a repetition of his claim in the internal appeal. The IAC concluded, correctly from the evidence, that the EPO did not discharge its duty of care to the complainant, but the IAC did not recommend any award of compensation on this basis. In the impugned decision, the Vice-President of DG4 did not depart from the IAC's conclusion that the EPO did not discharge its duty of care to the complainant but did not award him moral damages for this violation, which he claims. The claim is however dismissed as there is no persuasive evidence of moral injury to the complainant in respect of this violation caused by the conduct of the EPO, even if unlawful (see Judgment 4644, consideration 7). Moreover, the complainant provides no evidence that proves that the actions or omissions of the EPO amounted to a misuse of authority in the sense stated, for example, in consideration 11 of Judgment 4382 or consideration 19 of Judgment 4081.

14. The complainant requests a retroactive upgrading of his post to grade A2 in career group A4/1 in relation to his post of Brand Manager occupied as of 2004 and to the position of Application Manager occupied as of 1 November 2006. These requests are rejected

as a decision as to the level of a post is within the purview of the competent authorities charged with evaluating and classifying posts pursuant to the applicable rules and not within the purview of the Tribunal, which will only determine the legality of the exercise of that power (see, for example, Judgments 4437, consideration 2, and 2514, consideration 13). The complainant's request for the payment of incurred salary losses with interest is also rejected as the question whether he incurred loss of salary, and, if so, the quantum, can only be determined on the completion of the evaluation which the EPO agreed to undertake. By extension, there is no basis on which to award the complainant 10,000 euros for material damages, which he seeks.

15. The complainant's request for an award of punitive damages in the amount of 20,000 euros is also rejected as he provides no evidence to prove that by the actions and/or omissions he complains of the EPO intended to cause him harm or that there was bias, ill will, malice, bad faith or other improper purpose on which to base such an award (see, for example, Judgments 4493, consideration 11, and 4484, consideration 9).

The complainant's request for costs for the internal appeal procedure is moot as, in the impugned decision, the Vice-President of DG4 agreed with the IAC's recommendation to reimburse his reasonable legal costs incurred in those proceedings on his submission of the relevant invoices.

16. In the foregoing premises the complaint will be dismissed in its entirety.

#### DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 8 November 2022, 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 1 February 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ