

H. (No. 29)

v.

EPO

137th Session

Judgment No. 4801

THE ADMINISTRATIVE TRIBUNAL,

Considering the twenty-ninth complaint filed by Mrs E. H. against the European Patent Organisation (EPO) on 9 March 2021 and corrected on 12 April, the EPO's reply of 4 August 2021, the complainant's rejoinder of 13 December 2021 and the EPO's surrejoinder of 14 March 2022;

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 appointment of the Principal Director of Human Resources.

In November 2012, the European Patent Office, the EPO's secretariat, published vacancy notice TAI/5380 for the grade A6 post of Principal Director of Human Resources. The complainant, who was at the material time a grade A4 employee, applied for the post.

On 30 January 2013, the Vice-President of Directorate-General 4 announced that a new Principal Director of Human Resources was appointed with effect from 1 February 2013. The complainant initiated the internal appeal proceedings in early 2013 challenging that appointment. On 15 February 2016, the President of the Office rejected the appeal as irreceivable insofar as she requested the "re-publication"

of the contested post and the exclusion of the successful candidate from participation in the procedure. The appeal was otherwise unfounded. The complainant impugned that decision before the Tribunal. However, pursuant to Judgments 3694 and 3785, in which the Tribunal considered that the composition of the Appeals Committee was unlawful, the President withdrew his decision in March 2017 and referred the matter back to the Appeals Committee.

The complainant retired on 1 July 2018.

In January 2019, the complainant was informed that the Appeals Committee had registered the remitted appeal and that it would reconsider it based on the file as it then stood. However, the parties could add comments in respect of new facts that had occurred in the meantime. The complainant provided additional comments in February 2019 referring to her complaint against the President's initial decision that was still pending before the Tribunal. She requested additional moral damages for the delay in the examination of her case, the reimbursement of the costs she incurred in filing her initial complaint and the payment of the costs she would incur in pursuing her current appeal with the Appeals Committee.

In Judgment 4256, delivered in public on 10 February 2020, the Tribunal examined the complainant's initial complaint. It ruled that the withdrawal of the impugned decision was lawful, and dismissed the complaint as being without object. However, it noted that the complainant may have incurred costs in filing a complaint against a decision which had been presented to her as a final decision that could be impugned before the Tribunal. As the withdrawal of the impugned decision was not caused by the complainant but by the way in which the EPO had interpreted its own rules, the Tribunal held that she might be entitled to costs and stated that such costs should be considered in the resumed internal appeal proceedings.

On 6 April 2020, the complainant was informed that her appeal would be treated in accordance with the written procedure and dealt with at one of the Appeals Committee's next sessions.

In its opinion of 14 October 2020, the Appeals Committee indicated that the additional submissions the complainant made in February 2019 were considered insofar as they related to new relevant facts arising following the remittal of her appeal. The minority of the Appeals Committee considered that the documents on file did not allow it to reach a conclusion as to whether the appointed candidate to the contested selection procedure possessed all the qualifications specified in the vacancy notice. It therefore recommended that the complainant be given access to the evidence on which the appointing authority had based its decision. On the contrary, the majority considered that it had adequate evidence on the file to dispose of the case, and that in the absence of any motion for disclosure by the complainant, it was unnecessary to order further disclosure. It indicated that the Office had disclosed the full report of the Selection Board on the contested selection procedure and further information on the successful candidate's employment experience under the condition that it be kept confidential. The Appeals Committee unanimously found that the appeal was irreceivable insofar as the complainant sought the "re-publication" of the contested post and the exclusion of the successful candidate from the procedure. On the merits, the majority held that, pursuant to applicable rules, the appointing authority had discretion in deciding whether to have only an internal procedure or an internal and external selection procedure, but that it should also consider offering career opportunities to staff. Hence, the choice of an internal competition was in line with applicable rules. The majority also found that applicable provisions permitted the appointment of a grade A3 employee to a grade A6 post. The complainant did not prove irregularities in the selection procedure, bias or improper motive on the part of the appointing authority. The majority therefore recommended dismissing the appeal as unfounded. The Appeals Committee unanimously recommended reimbursing the reasonable and justified legal costs she had incurred during the related proceedings before the Tribunal and awarding her moral damages for undue delay. However, the majority and the minority disagreed on the quantum.

On 11 December 2020, the complainant was communicated the President of the Office's decision to endorse the Appeals Committee's unanimous recommendation that her appeal was partly irreceivable and the majority's recommendation regarding the merits of the appeal. It also endorsed the majority's recommendation to award her 900 euros for the length of the procedure. She was asked to provide evidence of the costs she incurred in the filing of her earlier complaint. That is the impugned decision.

The complainant asks the Tribunal to set aside the impugned decision, to annul the President's decision announced on 30 January 2013, and to award her material damages in an amount equivalent to the difference between the remuneration she would have received if she had been appointed to the contested position and the remuneration she actually received in her former position. She also seeks an award of moral damages "for the injustice and personal harm caused by the contested decisions" as well as for undue delay in the internal appeal proceedings. She asks to be granted interest on all amounts awarded to her and to be reimbursed her costs. Lastly, she asks the Tribunal to award her any other relief as it determines to be just, necessary, appropriate and equitable.

She requests the Tribunal to order the disclosure of the selection procedure file, including "the full report of the Selection Board", the disclosure of the names of the members of the Selection Board in charge of procedure TAI/5380 so that they can be heard as witnesses, and the disclosure of any further information, in particular the information concerning the successful candidate's employment experience, as referred to under paragraph 39 of the Appeals Committee's opinion of 14 October 2020, and "the documentation of the partiality objection as referred under paragraph 35 of the opinion".

The EPO asks the Tribunal to declare the complaint irreceivable for lack of a cause of action and subsidiarily unfounded. It did not provide the documents requested alleging that they are "secret", and, in any event, too vague. It adds that the complainant was paid 1,400 euros in relation to the costs incurred in filing the complaint that was rejected by Judgment 4256.

CONSIDERATIONS

1. In 2013, the complainant was a member of staff of the EPO. The complainant retired from service with effect from 1 July 2018. On 30 January 2013, the Vice-President of Directorate-General 4 announced the appointment of a new Principal Director of Human Resources, effective 1 February 2013. Both the new Principal Director of Human Resources and the complainant had participated in the competition for the post. The complainant unsuccessfully sought a review of the decision to appoint the new Principal Director of Human Resources and was unsuccessful in her subsequent appeal to the Appeals Committee leading to a final decision of the President of the Office, dated 15 February 2016, rejecting her appeal.

2. The complainant has requested oral proceedings. However, the submissions and evidence produced by the parties are sufficient to enable the Tribunal to resolve the issues raised in this case. Accordingly, the request for oral proceedings is rejected.

3. On 9 May 2016, the complainant filed her twenty-third complaint (“her initial complaint”) with the Tribunal impugning the decision of 15 February 2016. It is unnecessary to repeat the events that led to the withdrawal of the decision of 15 February 2016. They are sufficiently set out earlier in this judgment and in Judgments 3694, 3785 and 4256. Suffice it to note that an Appeals Committee considered again the complainant’s challenge to the decision of 30 January 2013, recommending in its opinion of 14 October 2020 that, in part, the appeal should be dismissed as irreceivable (unanimously) and, as to the remainder, should be dismissed as unfounded (by a majority). The President decided, by letter dated 11 December 2020, to follow those last two mentioned recommendations and dismissed the appeal. He also decided to award the complainant 900 euros for the “length of procedure”. The complainant impugns this decision in a complaint filed with the Tribunal on 9 March 2021 (“the current complaint”).

4. It is unnecessary to consider the merits of the substantive arguments advanced by the complainant concerning the unlawfulness of the decision to appoint the new Principal Director of Human Resources and related issues, as the outcome of the complaint can be determined by considering only the relief the complainant seeks. It is listed in her brief in her current complaint under 12 numbered paragraphs. The first is that the decision of 11 December 2020 be set aside. The second is to annul the decision of the President of 30 January 2013 appointing the new Principal Director of Human Resources. The third, fourth and fifth are procedural and concern evidentiary matters directed to establishing that the second order should be made. The sixth is that material damages be awarded being the difference between the remuneration the complainant would have received had she been appointed Principal Director of Human Resources and the remuneration she actually received. The seventh is that she be awarded moral damages “for the injustice and personal harm caused by the contested decisions”. The eighth is that moral damages be awarded (12,500 euros) for the excessive duration of the internal appeals procedure of seven years. The ninth is that interest be awarded. The tenth is that she be paid her legal costs for her internal appeal and actual costs for her initial complaint which was examined in Judgment 4256. The eleventh is that she be paid her costs in pursuing the complaint before the Tribunal. The twelfth is a catch-all request for other relief which might be just, necessary, appropriate and equitable.

5. In her rejoinder, the complainant makes the following observations:

“The Defendant errs in claiming that the Complainant has no interest in setting aside the appointment decision. The Defendant shall, if it is decided by the Tribunal that the appointment of [the new Principal Director of Human Resources] is to be quashed, implement the legal consequences of the decision and reverse the unlawful decision. The concrete legal consequence, and the Complainant is aware of this, will not have a factual effect on her retirement or on the [...] Appointment [of the new Principal Director of Human Resources] PD 4.3 [...]

Nevertheless, the Complainant has a right to have established by a Judgment whether the selection procedure in which she participated was fair and legally correct. Such a decision has an impact on whether the Complainant is entitled to damages or not. Finally, the decision in this case will have an impact on future procedures that are similar in nature and will contribute to legal clarity and to the sense of justice in general.”

6. The comment at the end of the first paragraph quoted above is tantamount to a concession, correctly made, that the question of the legality of the appointment of the new Principal Director of Human Resources, insofar as the rights of the complainant are concerned, is moot. As the complainant has now retired, no order would be made setting aside the appointment and ordering the resumption of a competition (see Judgment 1549, consideration 8), nor should an order be made setting aside the rejection of the internal appeal. Insofar as the complainant contends the legality of the appointment should be determined as a prelude to awarding her material and moral damages, she is mistaken. No claim for material damages was made in the internal appeal and cannot now be made in the Tribunal (see, for example, Judgments 4304, consideration 8, and 2360, consideration 7). Her claim for material damages is, in any event, self-evidently entirely misconceived. She cannot claim material damages on the untested assumption that she would have been appointed to the position.

7. Insofar as moral damages are concerned, she simply asserts in her brief that she seeks such damages “for the injustice and personal harm caused by the clearly discriminatory underevaluation of the Complainant’s professional experience in order to favor [the new Principal Director of Human Resources]”. Beyond this broad statement, there is no specification of the moral injury caused by the appointment nor evidence supporting its existence. These matters precondition the award of moral damages (see, for example, Judgment 4644, consideration 7). The complainant argues that, once appointed, the new Principal Director of Human Resources engaged in a “witch hunt [using] all means at her disposal to permanently destroy the Complainant’s good reputation through character assassination culminating in her undue dismissal in January 2016 [causing] lasting and serious damage to the Complainant’s

career and health”. But this, even if true, is beside the point. The issue in these proceedings is the legality of the new Principal Director of Human Resources’ appointment, not her conduct once appointed.

8. In circumstances where the Tribunal would not grant the relief of setting aside the appointment of the new Principal Director of Human Resources and would not award moral or material damages, the complainant would not, subject to one possible qualification, be the beneficiary of a costs order in these proceedings. How costs should be awarded in the earlier case of her twenty-third complaint, which was decided in Judgment 4256, was a matter for the Tribunal in those proceedings and any subsequent enforcement proceedings. Costs in the internal appeal are ordinarily not awarded (see Judgment 4554, consideration 8) and this is not an exceptional case where they should be. The possible qualification concerning costs just referred to would arise if the complainant was partially successful in these proceedings by establishing that she was entitled to 12,500 euros moral damages (or some other amount) for the excessive duration of the internal appeals procedure over seven years. However, she was awarded 900 euros in the impugned decision of 11 December 2020 for the delay. The Tribunal is satisfied this amount is adequate and should not be augmented.

9. In the result, the complaint should be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 20 October 2023, Mr Michael F. Moore, Vice-President of the Tribunal, Sir Hugh A. Rawlins, Judge, and Ms Hongyu Shen, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 31 January 2024 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

HUGH A. RAWLINS

HONGYU SHEN

MIRKA DREGER