Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

118th Session **Judgment No. 3352**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints filed by Ms Y. A., Ms A.-M. McC., Mr R. O., Mr J. R. and Mr C. S. against the European Patent Organisation (EPO) on 2 June 2010 and corrected on 18 June, the EPO's reply dated 27 September, the complainants' rejoinders of 30 October 2010, the EPO's surrejoinder dated 8 February 2011, the complainants' further submissions of 20 May and the EPO's final comments thereon of 29 August 2011;

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 and the pleadings may be summed up as follows:

A. The complainants are staff members of the European Patent Office, the secretariat of the EPO, who joined the Organisation at grade B1 or B2. At the material time they each held the post of "Administrative Assistant – Pre-Classification and Routing".

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, and the B6/B4 group was extended to include employees other than programmers. Circular No. 253 of 21 December 1998, which entered into force on 1 January 1999, provides guidelines for the implementation of the new career system for categories B and C, including through the establishment of a Harmonisation Committee to "seek to ensure harmonisation, Office-wide, of the criteria for evaluating the level of the set of duties entrusted to one or more staff members graded in category B or C".

In November 2003 the staff was informed that a job grade evaluation would be carried out in order to verify whether the grading of B and C posts was in line with the duties performed. A firm of consultants was engaged to assist with this process, and a Working Group was set up by the Harmonisation Committee to supervise the consultants' evaluation. The results of the evaluation were announced in July 2004. The complainants' posts were to remain in grade group B5/B1. In February 2005 two of the complainants requested a review of this classification by the Job Grade Evaluation Panel, but the Panel confirmed that their posts belonged to the B5/B1 grade group. In a communication of 15 December 2006 the Principal Director Personnel informed staff members that the review process had been completed.

In March 2007 four of the complainants lodged an internal appeal with the President of the Office against the decision of 15 December 2006. They requested that their posts be reclassified in the A category or, subsidiarily, in grade group B6/B4, and they claimed damages and costs. As the President considered that their posts had been evaluated correctly, the appeals were referred to the Internal Appeals Committee (IAC) for an opinion. The fifth complainant, Mr S., then applied to intervene in the internal appeal and his application was accepted.

In its opinion of 18 January 2010, the IAC unanimously recommended that the President dismiss the appeal lodged by Mr S. as entirely unfounded, on the ground that he did not yet have sufficient experience to hold a post in the B6/B4 group. However, it

unanimously recommended allowing the remaining appeals in part by referring the matter of the grade of pre-classifier posts back to the Job Grade Evaluation Panel to undertake a new grading evaluation, taking into account the level of expertise required for such posts. It also recommended that each complainant be awarded 500 euros in moral damages to compensate for the excessive duration of the proceedings, as well as costs. The complainants were informed by letters of 19 March 2010 that the President had decided to dismiss their appeals as entirely unfounded, but to award each of them 500 euros in costs in view of the duration of the proceedings. That is the impugned decision.

B. The complainants contend that the IAC erred in its finding that an A4/A1 grading was not justified for the pre-classifier posts on the ground that none of the complainants had completed university studies or had equivalent professional experience. They state that all but one complainant had completed university studies and that, in any case, they all have considerable professional experience justifying a regrading in the A4/A1 group. They agree with the IAC's finding that the methodology used by the Harmonisation Committee and by the external consultants is inappropriate for evaluating their posts, as it does not give sufficient weight to the level of expertise that their work demands.

The complainants submit that the impugned decision is flawed in that it was taken *ultra vires* by the Director Regulations and Change Management rather than the President. They point out that there is no evidence that the Director Regulations and Change Management had authority to take the decision. In their view, even if the President authorised the decision impugned, she failed to take into consideration essential factors.

They also contend that insufficient reasons were given for the impugned decision. The explanations focus on their alleged lack of qualifications, whereas the primary question is whether or not the tasks and responsibilities of a pre-classifier should be recognized as involving particular expertise. They consider that they should be

awarded moral damages based on the EPO's "malice" in overriding the IAC's opinion.

Lastly, the complainants argue that Mr S.'s appeal should not have been dismissed on the ground that he did not yet have the eight years of experience required for a post at the B6/B4 grade, as he was seeking the re-evaluation of his post, and not immediate regrading.

The complainants request oral proceedings for the purpose of hearing several witnesses. They ask the Tribunal to quash the impugned decision and to order the re-evaluation of their posts as experts, without the application of the consultants' methodology, but using a method that takes into account their expertise. They request that their posts be classified in category A on the basis of their long-standing experience or, subsidiarily, in the B6/B4 grade group. They also claim material damages, moral and/or punitive damages, and costs.

C. In its reply the EPO argues that the IAC members were correct in finding that the claim for re-classification in grade group A4/A1 is unjustified. It explains that pre-classification consists in assigning incoming patent applications to the correct technical field, but that it does not require the in-depth classification required of examiners. Therefore, the difference in grading is justified. The EPO points out that the complainants did not challenge the recognition of their previous professional experience when they joined the Office, and it emphasises that a post holder's personal qualifications are irrelevant to an objective evaluation of a post based on the nature of the tasks to be performed.

The EPO maintains that the methodology used for the general evaluation of all B and C category posts was also appropriate for the pre-classifier posts. It considers that the IAC erred in its finding that the methodology was flawed, because it confused the question of the evaluation of posts with the question of the evaluation of the post holder's individual qualifications. In its view, it would be contrary to

the purpose of the Office-wide evaluation of all B and C category posts, as well as to the principle of equal treatment, to apply a different methodology to certain posts or to adapt it to obtain a higher grading for certain posts.

The EPO submits that it was clearly the President who took the impugned decision, and that the Director Regulations and Change Management merely informed the complainants of the decision on her behalf. The allegation that the President failed to take into account essential factors is unsubstantiated. Moreover, the decision was duly and properly reasoned, in accordance with the Tribunal's case law, and the reasons for departing from the IAC's opinion were clearly explained in the letters sent to the complainants on 19 March 2010.

Noting that Mr S. does not yet have the required eight years' experience to qualify for a B6/B4 grade, the EPO questions whether he has a cause of action. It submits that there is no basis for the complainants' claims for damages and costs, and it considers that oral proceedings are unnecessary in this case.

D. In their rejoinder the complainants press their pleas. In their view, the impugned decision failed to take into consideration the fact that the tasks of a pre-classifier require special expertise that ought to be properly valued. They submit that their request for oral proceedings is both reasonable and in accordance with Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 14 of the International Covenant on Civil and Political Rights.

E. In its surrejoinder the EPO maintains its position in full. Emphasising that this is an exceptional measure, it produces a confidential document evidencing that the impugned decision was taken by the President herself. It submits that the complainants misunderstand the nature of the right to a "fair and public hearing" within the meaning of Article 6 and Article 14 of the above-mentioned conventions.

F. In their further submissions the complainants argue that the document produced by the EPO in its surrejoinder reveals that there was an unlawful internal agreement between the Directorate Employment Law (D 5.3.2.) and the department responsible for the B/C job grade evaluation process (D 4.3.2.2.) to reject the IAC opinion. In their view, the involvement of these departments is a violation of the Service Regulations for Permanent Employees of the European Patent Office and a breach of due process.

G. In its final comments the EPO denies any violation of the Service Regulations or of due process. It points out that it is within the functions of the Directorate Employment Law and the Department responsible for the B/C job evaluation to advise the President following the issuance of the IAC opinion.

CONSIDERATIONS

1. The impugned decisions are contained in five letters dated 19 March 2010. Four of those letters, addressed to complainants Yolande Abily, Anne-Marie McConnell, Radouan Ouasif and Johannes Rothengatter, are identical in content and inform those complainants of the President's decision not to endorse the IAC's recommendation to refer their cases back to the Job Grade Evaluation Panel on the grounds that "the Panel cannot deviate from the general methodology developed for the assessment of all B/C category posts and cannot make amendments in the methodology itself, which according to the Appeals Committee it has correctly applied". The fifth letter, addressed to complainant Christoph Sinn, informed him that the President had decided to endorse the unanimous opinion of the IAC and to reject his appeal as unfounded. All five complainants were, however, awarded 500 euros in compensation for the long duration of the appeal procedure.

2. The five complaints are based on the same submissions and seek the same relief. It is therefore appropriate that they be joined to form the subject of a single judgment.

3. The complainants challenge the decision of 19 March 2010 on the following grounds:

(a) no evidence was provided to indicate that the Director Regulations and Change Management (the author of the five letters containing the impugned decisions) had the authority to act on behalf of the President;

(b) the decisions lacked motivation;

(c) the adopted methodology was inadequate to evaluate the pre-classifiers' posts, whose tasks required special expertise which ought to have been valued and properly weighed; and

(d) the application of the consultants' methodology resulted in the absurd classification of the pre-classifiers' posts as being in the B5/B1 grade group.

In further submissions the complainants also challenge the fact that the President adopted the final decisions on the basis of an internal agreement between the Directorate Employment Law (5.3.2), the Directorate Regulations and Change Management (4.3.1) and the department responsible for the B/C job grade evaluation process (4.3.2.2.), following the completion of the internal appeals proceedings and the delivery of the IAC's opinion. The complainants assert that this deprived them of their right to reply and was contrary to the principle of *nemo judex in causa propria* as a party of the litigation had intervened in the proceeding as well as in the adoption of the final decision.

4. The complainants have presented their case extensively and comprehensively in their written submissions, which are sufficient to enable the Tribunal to reach a reasoned and informed decision. Their request for oral proceedings is therefore rejected.

5. All the complaints are unfounded on the merits and it is thus unnecessary to deal with the question of the receivability of the complaint of Mr S.

6. With regard to the last claim, raised in further submissions and summarised in the final paragraph of consideration 3 above, the Tribunal considers that the President acted properly in asking the competent Directorates (5.3.2, 4.3.1 and 4.3.2) for advice prior to adopting the final decision. There is no requirement that the President inform the complainants of these discussions. The adversarial principle was respected throughout the internal appeal proceedings. This type of post appeal consultation is normal and unexceptionable. There was no violation of the principle of *nemo judex in causa propria* as the internal appeal proceeding is a quasi-judicial administrative proceeding which results in a non-binding recommendation and the President's final decision is a final administrative decision which can be appealed before the Tribunal for a final, neutral, judicial decision. Considering this, the claim must be rejected.

7. The claim that the Director Regulations and Change Management did not have the authority to act on behalf of the President is unfounded. Even without considering the document (*Antrag*) attached as an annex to the Organisation's surrejoinder, which showed that the President personally took the final decision, the fact that the letters of 19 March 2010 stated explicitly that "[t]he President of the Office has carefully considered the unanimous opinion of the Appeals Committee concerning your appeal against the results of the evaluation of your job grade. I am asked to inform you that, the President has decided […]" (and "I am asked to inform you that […] the President has decided […]" in the case of Mr S.'s letter) is sufficient to show that the decision was not taken by the Director, but that he was acting merely as the designated intermediary in informing the complainants of the President's decision, in accordance with the normal administrative practice (see Judgment 2924, under 5).

8. The decisions were properly motivated in the letters of 19 March 2010 and referred specifically to the various acts of the evaluation proceedings which implemented the adopted methodology. The Tribunal notes that the IAC and the complainants agree that the

methodology was properly implemented, even if they disagree on the use of that methodology to assess the pre-classifier posts.

9. Coming to the central plea regarding the alleged inadequacy of applying the chosen methodology to classify the pre-classifier posts, the Tribunal concludes that this claim must be rejected. The classification of a post constitutes an act of technical evaluation and "[a]s the Tribunal has consistently held, the grading of posts is a matter within the discretion of the executive head of an international organisation. It depends on an evaluation of the nature of the work performed and the level of the responsibilities pertaining to the post which can be conducted only by persons with relevant training and experience. It follows that grading decisions are subject to only limited review and that the Tribunal cannot, in particular, substitute its own assessment of a post for that of the Organisation. A decision of this kind 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, Judgments 1281, under 2, or 2514, under 13)." (See Judgment 2927, under 5.) In the present case, the Tribunal is not persuaded that the results of the post evaluation involve a manifestly mistaken conclusion, and the complainants have not established that the methodology adopted for all B/C category posts was technically flawed. In effect, the complainants are asking the Tribunal to go beyond its remit and to substitute its choice of methodology for the technical evaluation. This, the Tribunal will not do for the reasons detailed above.

10. The EPO submits that "[p]reclassification tasks consist in assigning the incoming patent applications to the correct technical field, so that the application can be forwarded to the appropriate examining divisions. As such, it does not require an in-depth classification." The applied methodology consisted of two phases, the first of which consisted in providing employees with a questionnaire relating to their post, and the second which analysed the answers to

the questionnaire on the basis of ten factors. Each factor was weighted according to the particular importance and relevance for each specific post and the resulting tally of points awarded to each factor resulted in the classification of the post. The arguments raised by the IAC and by the complainants regarding the inappropriateness of applying the chosen methodology to evaluate the pre-classifier posts, are not convincing. Several factors are identified by the complainants as establishing that the classification was fundamentally flawed. These factors included that, on occasions, pre-classification was done by examiners, that interpreters have a higher classification and that difficulties are experienced in recruiting pre-classifiers. However, the existence of these factors does not establish any judicially reviewable flaw in the classification process.

11. The Tribunal concludes that the methodology used and the classification of the pre-classifier posts did not involve any reviewable error and that, consequently, the complaints must be dismissed.

DECISION

For the above reasons,

The complaints are dismissed.

In witness of this judgment, adopted on 15 May 2014, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Mr Michael F. Moore, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

GIUSEPPE BARBAGALLO
DOLORES M. HANSEN
MICHAEL F. MOORE

DRAŽEN PETROVIĆ