

**C. P. (No. 2)**

**v.**

**EPO**

**128th Session**

**Judgment No. 4193**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Ms S. E. E. C. P. against the European Patent Organisation (EPO) on 28 September 2012, the EPO's reply of 21 January 2013, the complainant's rejoinder dated 28 February and the EPO's surrejoinder of 7 June 2013;

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 the classification of her former post.

The complainant joined the European Patent Office, the secretariat of the EPO, in October 1990 as a Formalities Officer, Patent Administration. At the material time she held grade B5. Pursuant to Administrative Council decision CA/D 11/98 of 10 December 1998, the Office 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 for staff members referred to as administrative employees, combining the former grade groups B1-B4 and B3-B5, and grade group B6/B4 was expanded to include staff members who were given the title of "supervisor/head of section".

In December 2003 the Office commissioned a consultancy firm to develop a methodology to be used to determine objectively the grade group to which a given post in category B should belong. The evaluation methodology was based on the analysis of questionnaires filled in by representatives of each post concerned and endorsed by their line manager. The complainant was not selected as a representative for the post of Formalities Officer.

The consultants issued their final report in 2004. Their evaluation had revealed that some Formalities Officers, considered as experts or coordinators, were performing tasks at a higher level than others and that three generic job profiles could be identified. Accordingly, they recommended that some Formalities Officer posts be classified in the B6/B4 grade group whereas others should remain in grade group B5/B1. Staff members concerned were informed of the outcome of their job grade evaluation and were given until 28 February 2005 to submit a request for review if they considered that the level of their tasks differed from the grading attributed to their post. That review was to be conducted by the Job Grade Evaluation Panel (hereinafter the “JGE Panel”).

On 22 February 2005 the complainant submitted a request for review asserting that she had not received any letter concerning the grading of her post. By letter of 12 December 2006, the Chairman of the JGE Panel and the Principal Director Patent Administration confirmed to the complainant that, based on the different profiles identified by the consultants, her post corresponded to the “Formalities Officer Phase II – Substantive Examination” profile and would thus remain in grade group B5/B1.

By a note of 15 December 2006, staff members concerned were informed that the review process was completed and that the job profiles developed for each post would enter into force as of 1 January 2007. As a result of the review, a pool of 38 posts in grade group B6/B4 was created for the posts corresponding to “expert job profiles”. These posts were to be filled through a selection procedure.

On 22 March 2007 the complainant lodged an internal appeal against the decision of 12 December 2006. She argued that her job profile did not correspond to the generic job profile of “Formalities

Officer Phase II – Substantive Examination” and requested that her post be placed in grade group B6/B4. According to her, the main tasks that she was performing involved a higher level of skills and responsibilities than that of “normal” Formalities Officers.

Her case was referred to the Internal Appeals Committee (IAC) in May 2007 and the IAC heard the parties in December 2011.

In January 2012 the complainant was appointed to a post of Legal Administration Officer, at grade B5.

On 13 March 2012 the IAC rendered its opinion and unanimously found that the review of the complainant’s post was vitiated from a procedural point of view. Its members were of the opinion that the sole circumstance that her tasks were not comparable to those normally performed by Formalities Officers was sufficient to consider that she was entitled to have her post re-assessed as such by the JGE Panel. They found that the particular expertise of her tasks had not been properly taken into account, and that her post should not have been reviewed following the standard procedure applicable to all Formalities Officers. A majority of the IAC members recommended that the complainant be awarded 2,000 euros to compensate for the loss of the opportunity to have her post properly reviewed and that a new assessment of the tasks performed by the complainant since 2005 be carried out. The minority recommended that in addition to moral damages, the complainant’s post should be placed in grade group B6/B4. According to the minority, given the time that had elapsed since the contested decision was challenged, a new review by the JGE Panel would not be appropriate.

By a letter of 19 June 2012, which is the impugned decision, the complainant was informed that the Vice-President of Directorate-General 4, by delegation of power from the President of the Office, had decided to grant her 2,000 euros in moral damages for the loss of chance of a possible upgrade of her previous post as Formalities Officer. The Vice-President considered that the IAC’s recommendation concerning the reassessment of her tasks was outside the scope of the internal appeal since, as of January 2012, she was assigned to the post of Legal Administration Officer whereas the internal appeal was directed against the evaluation of her former post of Formalities Officer. However, the

Vice-President noted that an analogous job profile to the post of Legal Administration Officer currently held by the complainant was being evaluated by the JGE Panel and suggested that should the outcome of that evaluation result in a recommendation to place the analogous post in grade group B6/B4, the Office would agree to examine the grading of her current post accordingly.

By letter of 3 December 2012 the complainant was informed that the analogous post was maintained in grade group B5/B1 and that, as a result, the grading of her current post would not be re-examined.

The complainant asks the Tribunal to retroactively reclassify her post in grade group B6/B4 as of March 2005 or, failing that, as from the earliest possible date. Should the Tribunal deny these requests, she asks that her post be reassessed by a job grade evaluation panel. She further seeks compensation for not upgrading or reassessing her job grade group as from 19 June 2012, the date of the impugned decision, until such upgrading or reassessment occurs.

The EPO asks the Tribunal to reject the complainant's claims as partly irreceivable and otherwise unfounded.

#### CONSIDERATIONS

1. The complainant challenges the decision to maintain her former post of Formalities Officer in the B5/B1 grade group after a reclassification exercise. In the impugned decision of 19 June 2012, the Vice-President of Directorate-General 4 upheld the decision of 12 December 2006 which had confirmed that classification following her request for review. The Vice-President accepted the unanimous recommendation by the IAC to pay the complainant 2,000 euros in damages. He however rejected the further recommendation by the majority to carry out a reassessment of the complainant's current post to clarify whether its grading was correct, basing the new assessment on the functions and tasks which she had performed since her request for review in 2005. The Tribunal notes that it was within the purview of the IAC to make this recommendation in its endeavour to resolve the dispute (see Judgments 3703, consideration 6, and 3318, consideration 5).

However, the further recommendation to carry out a reassessment of the complainant's current post was outside the scope of the internal appeal. Thus, its rejection in the impugned decision was not unlawful. The complainant is therefore not entitled to the moral damages which she claimed on this ground.

The Vice-President, in the impugned decision, also rejected the recommendation by the minority of the IAC to upgrade the complainant's post to the B6/B4 grade group as of the date on which the posts of experts were established. However, such a recommendation is to be made by persons who possess the necessary technical experience, expertise and competence to carry out an evaluation and the final decision as to the grade level of a post is within the purview of the President as the executive head of the EPO.

2. It will accordingly be recalled that on consistent precedent the basic applicable principles where the reclassification of a post is challenged have been stated as follows in Judgment 3589, consideration 4, for example:

“It is well established that the grounds for reviewing the classification of a post are limited and ordinarily a classification decision would only be set aside if it was taken without authority, had been made in breach of the rules of form or procedure, was based on an error of fact or law, was made having overlooked an essential fact, was tainted with abuse of authority or if a truly mistaken conclusion had been drawn from the facts (see, for example, Judgments 1647, consideration 7, and 1067, consideration 2). This is because the classification of posts involves the exercise of value judgements as to the nature and extent of the duties and responsibilities of the posts and it is not the Tribunal's role to undertake this process of evaluation (see, for example, Judgment 3294, consideration 8). The grading of posts is a matter within the discretion of the executive head of the organisation (or the person acting on her or his behalf) (see, for example, Judgment 3082, consideration 20).”

3. By way of perspective, the classification of the complainant's post, which she challenges, was done in an exercise that was initiated on the basis of Administrative Council decision CA/D 11/98 of 10 December 1998 to introduce a new career system for employees in categories B and C. The reclassification process involved the evaluation of posts and a subsequent harmonisation exercise. A Harmonisation Committee was instituted to ensure a proper implementation of the criteria to be applied

for evaluating the level of duties attached to the various posts. A job grade evaluation was carried out by an external consulting firm. It developed a methodology that was used to determine in which grade group a given B or C category post should fall. After the consultation process, the Office instituted an internal working group. That group proposed implementing the consultants' recommendation to create a new category of Formalities Officers named Formalities Officers Experts in grade group B6/B4. The complainant was informed that her post of Formalities Officer would remain in the B5/B1 grade group.

At the request of some staff members who disagreed with their sample profiles or claimed that they were performing tasks corresponding to the B6/B4 grade group, a review process was carried out by a JGE Panel. The complainant was informed that her post of "Formalities Officer Phase II – Substantive Examination" remained in the B5/B1 grade group. This was confirmed by letter dated 12 December 2006 to the complainant from the Chairman of the JGE Panel and the Principal Director Patent Administration. The letter informed her that this decision was in line with the consultants' findings. In a note of 15 December 2006, the Principal Director of Personnel informed all concerned staff members that the results of the reclassification exercise were to be implemented with effect from 1 January 2007. By letter dated 22 March 2007, the complainant lodged an internal appeal against the decision contained in the letter of 12 December 2006.

4. In her internal appeal, the complainant contended that placing her post in the B5/B1 grade group was wrong because her job profile did not correspond with the generic job profile. She argued that "potential further tasks" listed under two aspects of her generic job profile constituted the main duties attaching to her post; that she consistently dealt with very complicated tasks, including those sent to her from the SIS (supplementary international search) units, which could not be done with the skills of a "normal" Formalities Officer and that her position was that of an expert in complicated legal matters who coached and counselled other Formalities Officers. She drew reference to her staff report for the period 1 October 2004 to 31 December 2005, which emphasized, under her main and other duties, the high

responsibilities and level of skills of her post compared to those of the other Formalities Officers. She noted that she frequently drafted decisions as a normal aspect of her job and stated that this was work at a level that corresponded with that of an examiner or a lawyer in the A category. She accordingly requested that her post be upgraded to the B6/B4 grade group. In effect, the complainant challenged the grade ascribed to her post from the reclassification exercise on the allegation that some essential fact was overlooked.

5. The IAC stated that “its members [were] of the unanimous opinion that the sole circumstance that [the complainant’s] tasks were not comparable to those normally performed by Formalities Officers was sufficient to consider that she was entitled to have her post reassessed as such by the [JGE] Panel” and that they considered “that the particular expertise of her tasks had not been properly taken into account, whereas it should have prevented her post from being reviewed following the standard and common procedure applicable to all the Formalities Officers”. The IAC unanimously concluded that in the result the review of the complainant’s post was vitiated by a procedural flaw. The majority thereupon recommended that the complainant be compensated by paying her 2,000 euros damages for the failure to properly evaluate her post and observed that, because of the time that had elapsed since the evaluation exercise, “a retroactive upgrade of her post within grade group B6/B4, which would require [endorsement] by the Administrative Council, [appeared] not realistic”.

6. In the impugned decision, the Vice-President of Directorate-General 4 in effect accepted that the evaluation of the complainant’s post was vitiated by a procedural flaw when he informed her that he had decided to allow her appeal insofar as, in accordance with the opinion of the majority, she “w[ould] be paid [...] 2,000 [euros] in damages for the loss of the chance of a possible upgrade of [her] previous post as Formalities Officer” and that “[p]ayment w[ould] be made directly to [her] bank account shortly”. In the Tribunal’s view, this sum for the loss of that opportunity was inadequate given the adverse effect which that procedural flaw may have had on her career. For this purpose, the Tribunal will award her additional compensation in the amount of 5,000 euros.

Inasmuch as it is within the authority of the President to determine the grade of a post, the Tribunal does not have the competence to make an order which the complainant seeks that it upgrade her post to the B6/B4 grade group retroactively from March 2005 or from the earliest possible date. Moreover, given the lapse in time since her Formalities Officer post was assessed in 2005 and the fact that the complainant was appointed to another post in 2012, no practical purpose will now be served by ordering that the matter be returned to the EPO to have the post reassessed by a JGE Panel.

#### DECISION

For the above reasons,

1. The EPO shall pay the complainant additional compensation in the amount of 5,000 euros.
2. All other claims are dismissed.

In witness of this judgment, adopted on 20 May 2019, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 3 July 2019.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ