

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

*Registry's translation,  
the French text alone  
being authoritative.*

**P. (No. 2)**

**v.**

**EPO**

**122nd Session**

**Judgment No. 3699**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr B. Y. P. against the European Patent Organisation (EPO) on 20 June 2013 and corrected on 12 July, the EPO's reply of 11 November 2013, the complainant's rejoinder of 31 January 2014 and the EPO's surrejoinder of 10 June 2014;

Considering Article II, paragraph 5, 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 decision to transfer him to a Senior Advisor post.

At the material time, the complainant held the grade A6 post of Head of the Internal Audit department, that is, Principal Directorate 0.6 of the European Patent Office, the EPO's secretariat. When the President of the Office proposed that the Administrative Council abolish the Audit Committee – one of its subsidiary bodies – the complainant expressed his disagreement. On 30 June 2011 the Administrative Council adopted decision CA/D 4/11 abolishing the Audit Committee with immediate effect.

By a letter of 21 July 2011, the President of the Office informed the complainant that his public "opposition" to the decision to abolish

the Audit Committee made it impossible for him to continue as Head of Internal Audit, and that he considered that this was no longer in the interests of the service. Under Article 12, paragraph 2, of the Service Regulations for permanent employees of the EPO, the President therefore proposed to transfer the complainant to a post of “special advisor” and asked him to submit his “reactions” by 1 August.

A vacancy notice for the grade A6 post of Senior Advisor planning and preparation of the unitary patent – which was to be filled by way of a transfer – was published on 6 September. On 16 September the complainant wrote to the President stating that he did not intend to apply for that post as he did not believe he had the necessary qualifications and experience. By a letter of 29 September the complainant was notified that in the Office’s interests the President had decided to transfer him to the post with effect from 1 October. On 14 December 2011 the complainant filed an internal appeal against this decision, submitting that it constituted an abuse of authority, a hidden disciplinary sanction and an affront to his dignity. He requested the cancellation of the decision, his reinstatement in a post that corresponded to his qualifications, experience and level, and redress for the injury that he claimed to have suffered.

The Internal Appeals Committee, to which the matter was referred, delivered its opinion on 14 December 2012 after hearing both parties. Considering in particular that the complainant’s transfer to a post that did not really correspond to grade A6 had injured his dignity, the Committee unanimously recommended that the President cancel the decision to transfer the complainant, award the complainant 25,000 euros in moral damages and take prompt action to reassign him to a genuine grade A6 post with a view to allowing the complainant to end his career on a positive note. Failing this, the complainant should be awarded additional damages of 5,000 euros. By a letter of 25 March 2013, which constitutes the impugned decision, the complainant, who had retired on 31 December 2012, was notified of the President’s decision to dismiss his internal appeal.

The complainant asks the Tribunal to rule that the impugned decision to transfer him to the post of Senior Advisor was unlawful and to award him 60,000 euros in compensation for the moral injury he considers he has suffered as well as 2,000 euros in costs.

The EPO asks the Tribunal to dismiss the complaint in its entirety.

### CONSIDERATIONS

1. In his complaint, the complainant asks the Tribunal to rule that the decision of the President of the Office to transfer him to a post of senior advisor unlawful and to award him 60,000 euros in compensation for moral injury as well as costs in the amount of 2,000 euros. In support of his complaint, he submits that his “transfer constituted an abuse of authority and a hidden disciplinary sanction and that the post to which [he] was transferred was fictitious and was created to suit the circumstances in violation of the applicable procedures”. He further submits that the post in question was not commensurate with his grade.

2. The EPO denies that the decision to transfer the complainant was unlawful. It further submits that, contrary to the complainant’s assertion, he was transferred to a post with grade A6 duties in keeping with his qualifications and experience.

3. This case presents two material questions. The first is that of whether or not the complainant’s transfer was wrongful. The second relates to the grade of the duties which the complainant was assigned; in other words, did the post of Senior Advisor to which the complainant was appointed correspond to a grade A6 position?

4. According to the complainant, his transfer was wrongful and was in fact a hidden sanction. He adds that the post to which he was assigned was “fictitious”. The defendant submits that the complainant was transferred in the EPO’s interests in light of his continuing opposition to the abolition of the Audit Committee.

5. Although the complainant believes that his transfer was a hidden sanction, he does not bring any evidence in support of this allegation. His submissions merely contain an unsubstantiated assertion that his transfer to the contested post of Senior Advisor was a hidden sanction for his refusal to apply for that post. Furthermore, in his rejoinder he writes that he has “never disputed the right of the President of the Office to order a transfer in the Organisation’s interests, of which he is the judge”. There is no doubt here as to the Organisation’s interests: as the defendant argues persuasively, “it was no longer in the Office’s interest for the complainant to remain as Head of Internal Audit given that his continuing opposition to the abolition of the Audit Committee demonstrated a marked divergence of opinion regarding the conditions in which Internal Audit was to operate and its position”. Moreover, the evidence shows that, contrary to what the complainant asserts, the post to which he was assigned involved duties that were real – irrespective of their level, which will be addressed below – and the post cannot therefore be regarded as “fictitious”.

6. The complainant submits that the post of Senior Advisor to which he was transferred was not commensurate with his A6 grade. In this regard, he stated in his internal appeal that Senior Advisor posts were “posts held by staff members who held grade A4 at most and who [did] not exercise any authority”. He added that the grade A6 responsibilities outlined in the “Job Descriptions” appended to the Service Regulations, according to which “[t]he Officer runs a prominent organisational unit covering several specialised fields or is chairman of a Board of Appeal [and] duties primarily consist in developing [...] authoritative guidelines [...] and taking decisions in particularly difficult and important cases”, were not involved in the task assigned to him, which merely consisted in “conduct[ing] an in-depth analysis of the situation and draft[ing] proposals”. The EPO maintains that the complainant’s duties in his new role of Senior Advisor corresponded to grade A6.

7. It is to no avail that the EPO attempts to show that the complainant’s duties were of grade A6 level. First, it invites the Tribunal

to interpret the job description appended to the Service Regulations liberally as, in the defendant's view, it would not be possible for the Office to perform its functions properly "if it were obliged to apply the generic post descriptions strictly to the letter, without regard to the particular circumstances of the case in question". Next, it poses the question, tailored to this particular case, of "whether, in the circumstances of the present case, the complainant's new role was reasonably commensurate with his grade", and not that of whether it corresponded exactly to grade A6 duties. Lastly, it asserts that "the strategic responsibilities inherent in the new post of Senior Advisor for planning and preparation of the unitary patent, though involving no management responsibilities, were nevertheless at the same level as those of a grade A6 post". These inconsistent arguments, submitted by the defendant to convince the Tribunal that the complainant's new duties were at grade A6 level, poorly disguise the fact that this was not at all the case. The defendant itself acknowledges in its submissions that "the complainant's new role did not entail all of the characteristics of a grade A6 post according to the generic description provided in the Service Regulations". The Tribunal concludes that the complainant's new duties were not commensurate with grade A6. The complainant did not run a prominent organisational unit covering several specialised fields; he was neither a Principal Director nor a Chairman of a Board of Appeal; he could not take decisions in particularly difficult or important cases. Hence, the contested transfer decision must, as the complainant requests, be ruled unlawful.

8. The EPO will be ordered to pay the complainant the sum of 10,000 euros as redress for the moral injury incurred as a result of that decision.

9. As the complainant succeeds in part, he is entitled to an award of costs, set at 2,000 euros.

DECISION

For the above reasons,

1. The impugned decision is quashed and the contested transfer decision is declared unlawful.
2. The EPO shall pay the complainant 10,000 euros in moral damages.
3. It shall also pay him 2,000 euros in costs.

In witness of this judgment, adopted on 28 April 2016, Mr Claude Rouiller, President of the Tribunal, Mr Patrick Frydman, Judge, and Ms Fatoumata Diakité, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 July 2016.

*(Signed)*

CLAUDE ROUILLER      PATRICK FRYDMAN      FATOUMATA DIAKITÉ

DRAŽEN PETROVIĆ