

## NINETY-SEVENTH SESSION

Judgment No. 2339

The Administrative Tribunal,

Considering the complaint filed by Mr T. N. against the European Patent Organisation (EPO) on 26 April 2003 and the Organisation's reply of 26 July 2003;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The complainant, a French national born in 1957, joined the European Patent Office – the EPO's secretariat – in November 1990 as an “Administrative Officer (Production Acceptance Officer)” at grade B5 in Operational Services.

By Circular No. 200 of 22 February 1991 it was announced that as from 1 January 1991 posts previously listed by grade were to be “gathered together according to function”. Within the B category there would be career groups B1-B4 and B3-B5. A third group, spanning grades B4 to B6, was established for a small number of programmer posts. That career system remained in force until 1999. Thereafter posts in the B category belonged either to a B1-B5 group or to a B4-B6 group.

By a note of 4 March 1991 the complainant was informed that his post had been classified in the B3-B5 group. The complainant considered that he was essentially performing the duties of a programmer and that his post should therefore have been classified in the B4-B6 group. He raised the matter with his supervisor, who also considered the classification of the complainant's post to be an anomaly, and who attempted, by a series of e-mail messages sent to his hierarchical superiors at various dates between May 1991 and June 1997, to have the post classified in the B4-B6 group. No decision was taken in response to these requests.

On 16 October 1998 the complainant wrote to the Director of Personnel, expressing the view that his post should be classified in the B4-B6 group and pointing out that he had been given assurances to that effect during his recruitment interview. He also wrote to the Head of Operational Services, on 23 April 1999, explaining his position and attaching copies of the previous correspondence on the matter.

By a note dated 23 June 1999, the Director of Personnel informed the complainant that in the light of the job description drawn up in September 1992 for his post, he considered the classification of the post in group B3-B5 to be correct, since his functions were not those of a programmer. The complainant replied by an e-mail of 6 July 1999, maintaining his objections to the classification of his post and referring to the assurances allegedly made during his recruitment interview, to his staff reports and to the fact that some non-programming staff had had their post classified in the B4-B6 group because their job descriptions mentioned the word “Analyst”. Further correspondence and discussions with the Administration ensued, but in a note dated 19 January 2000 the Personnel Department confirmed that his grade was correct at the time of recruitment, adding that since 1 January 1999 his post had become part of the new B1-B5 group, as had all posts previously in the B3-B5 group. It also informed him that the issue of whether the duties he was performing were consistent with the grade of the post he currently occupied was a matter to be “addressed to [his] director”. However, after the matter was discussed with the Head of Operational Services, the latter confirmed in a memorandum of 10 April that it was in accordance with the level of the complainant's tasks and responsibilities for his post to be in the B1-B5 career group.

By a letter of 7 July 2000 to the President of the Office, the complainant initiated an internal appeal against the decision notified to him on 10 April, asking the President to cancel that decision and to classify his post in the B4-

B6 career group with retroactive effect. On 8 September 2000 he was informed that his claim for “retroactive regrading” of his post had been referred to the Appeals Committee, but that his request for a review of the current classification of his post had been forwarded to the competent department for examination. A report on the classification of his post was issued on 15 March 2002 by Department 4.3.2.2. (Studies, Project and Application Management). The conclusion was that the complainant’s post had been correctly classified in the B3-B5 group with effect from 1 January 1991, since programming tasks represented only an insignificant part of the duties assigned to the complainant, as confirmed by the post description drawn up in September 1992, and that for the period 1999-2000 it had been correctly classified in the B1-B5 group.

The Appeals Committee issued its Opinion on 9 December 2002. It considered that the appeal should be allowed, on the grounds that the duties which the complainant was actually performing at the time when his post was classified in the B3-B5 group were primarily programming tasks corresponding to a post in the B4-B6 group. The Committee noted that the findings made by Department 4.3.2.2. on this issue were based on the vacancy notice and the post description, and not on the duties actually performed by the complainant, as evidenced in particular by his staff reports. It also noted that he had been recruited by the Office on the basis of his extensive experience as a programmer with a view to performing pending programming work. The Committee acknowledged that reclassification in the B4-B6 group might not be possible, but suggested that the complainant could be equated with a B4-B6 employee for promotion purposes.

By a letter of 10 February 2003 written on behalf of the President of the Office, the interim Director of Conditions of Employment and Statutory Bodies informed the complainant that the President did not accept the Committee’s arguments and had decided to reject his appeal. That is the impugned decision.

B. The complainant maintains that he was given assurances by the Office, during his recruitment interview, to the effect that his “normal career prospects” would extend to grade B6, and those assurances were a significant factor in his decision to accept the post. He asserts that he applied for a post as a programmer, but was offered the job of “Production Acceptance Officer”, which was described to him as a programming job which could lead to a promotion to grade B6. He considers that the prospect of reaching grade B6 was an acquired right which the Office breached when it subsequently classified his post in the B3-B5 group, thereby unilaterally modifying the terms of his appointment. Referring to the Tribunal’s case law, he points out that the promises made to him on recruitment had to be fulfilled, in accordance with the requirement of good faith.

He also argues that the classification of his post as a B3-B5 post was based on a factual error as to the nature of his work. Regardless of the title of the post, his work was that of an analyst programmer, and this was confirmed by those who, by their training and experience, were best placed to assess his work. He asserts that he consistently challenged his “grading” from the very beginning, yet for many years the Office failed to give any response. According to the complainant, this shows a lack of good faith on the part of the Office and constitutes a breach of its duty of care.

Lastly, the complainant accuses the Office of unequal treatment, referring to the case of a colleague recruited with no programming skills, whose post was reclassified as a B4-B6 post, despite the fact that that group was intended solely for programmer posts.

He seeks the “regrading” of his post with retroactive effect, or damages for loss of promotion. He also claims moral damages and costs.

C. The Organisation considers the complaint to be time-barred. The decision to classify the complainant’s post in the B3-B5 group was notified to him on 4 March 1991, yet the complainant did not file an appeal until 7 July 2000. Likewise, he failed to challenge the implied rejection of the request for reclassification that he made on 6 July 1999.

In subsidiary arguments on the merits, the Organisation denies that any promise was made to the complainant during his recruitment interview. It acknowledges that a normal career path was described to him, and that he was told that he could aim to reach grade B6, but rejects the view that this amounted to a promise. It stresses that the interview took place before the B3-B5 group was created.

It also denies that the complainant applied for a programmer’s post. He expressly applied for and accepted a post as “Production Acceptance Manager”. The evaluation of that post by the Office’s expert on organisational questions

confirmed that it was correctly classified in the B3-B5 group with effect from 1 January 1991, and there is no evidence that the complainant performs programmer duties in a way that would qualify his post for classification in the B4-B6 group.

The Organisation dismisses the allegation of unequal treatment as unsubstantiated. It also rejects the view that the complainant had an acquired right to promotion to grade B6, since appointment to a post at that grade occurs only by selection.

## CONSIDERATIONS

1. The internal appeal initiated by the complainant on 7 July 2000 concerned the classification of his post in the B3-B5 group which had occurred in 1991 pursuant to Circular No. 200, and the subsequent decision of 10 April 2000 by which the Office confirmed the classification of his post in the newly-defined B1-B5 career group. He sought the withdrawal of the latter decision and the reclassification of his post in the B4-B6 career group with retroactive effect from March 1991.
2. The Appeals Committee issued its Opinion on 9 December 2002. Despite the Organisation's objections, which were fully considered, it found the appeal to be receivable. On the merits, the Committee considered that the appeal should be allowed, on the grounds that the duties which the complainant was actually performing at the time when his post was classified in the B3-B5 group were primarily programming tasks corresponding to a B4-B6 post. The Committee held on the evidence before it that the findings made by Department 4.3.2.2. on this issue were based on the vacancy notice and the post description, and not on the duties actually performed by the complainant, as evidenced in particular by his staff reports. It also found as a fact that he had been recruited by the Office on the basis of his extensive experience as a programmer with a view to performing pending programming work. For those reasons, the Committee concluded that he ought to be treated as if he had been classified in the B4-B6 group as from 1 January 1991.
3. By a letter of 10 February 2003 from the interim Director of Conditions of Employment and Statutory Bodies, the complainant was informed that the President had decided to reject his appeal considering that his post and duties were correctly graded. That is the impugned decision.
4. The decision is laconic in the extreme. The entire text reads as follows:  
"The President of the Office has examined the opinion of the Internal Appeals Committee in case RI/56/00 concerning the upgrading of your post.  
I am asked to inform you that the President considers that the arguments given by the Committee in favour of your request are not convincing, the main reason being that the Office considers your post and duties to be correctly graded. On this basis, and for the other reasons put forward by the Office during the appeals proceedings, he has decided to reject the appeal."
5. The Tribunal has consistently stressed the requirement that where a final decision refuses, to a staff member's detriment, to follow a favourable recommendation of the internal appeal body such decision must be fully and adequately motivated. (For recent examples, see Judgments 2092, 2261 and, from the present session, Judgments 2347 and 2355.) It is not enough for the decision maker – in this case the President of the Office – simply to state that he is not convinced by the recommendation or to refer in general terms to the arguments presented by the Administration before the appeal body. Such statements do not adequately inform either the employee or the Tribunal as to the real reasons underlying the impugned decision. Nor do they show that the decision maker has properly fulfilled his duty to apply his own mind to the questions raised on the appeal and to give his own reasons for concluding as he has. It is not enough simply to endorse in broad terms all that the Administration, which, like the appellant, is subordinate to the President, has presented before the appeal body. The President is acting in a quasi-judicial capacity and he must be, and be seen to be, objective and impartial. At the very least, where it is intended to place reliance on arguments which are more fully set forth in some other document, that document must be precisely identified and a copy of the relevant passages should accompany the decision itself and be specifically endorsed as representing the President's own considered opinion which has been reached after the appellant's arguments have been placed before him.

6. The impugned decision here is clearly inadequate and must be set aside. The result is that the Appeals Committee's findings both as to receivability and as to the merits must be deemed to be accepted and the complainant is entitled to be reclassified as if he had been classified in the grade group for programmers B4-B6 as from the date of his formal request for reclassification, that is 6 July 1999. If necessary, his salary and benefits shall be adjusted accordingly.

7. Consequently, the complainant is entitled to 1,000 euros in moral damages, and 3,000 euros in costs for both the internal appeal and the present proceedings.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The EPO shall reclassify the complainant as if he had been classified in the career group for programmers B4-B6 as from 6 July 1999.
3. If necessary, it shall adjust his salary and other benefits accordingly.
4. It shall also pay him 1,000 euros in moral damages and 3,000 euros in costs.

In witness of this judgment, adopted on 19 May 2004, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Vice President, and Mrs Florida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 14 July 2004.

Michel Gentot

James K. Hugessen

Florida Ruth P. Romero

Catherine Comtet