

The Administrative Tribunal,

Considering the complaint filed by Mr J.D.M.L. B. against the European Patent Organisation (EPO) on 27 June 2006 and corrected on 27 July, the EPO's reply of 27 October 2006, the complainant's rejoinder of 11 January 2007 and the Organisation's surrejoinder of 22 March 2007;

Considering the application to intervene filed by Mr P. F. on 27 July 2006;

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 Belgian national born in 1968, joined the European Patent Office – the secretariat of the EPO – on 1 June 2000 as an examiner at grade A2 in The Hague. He was promoted to grade A3 on 1 June 2002.

By decision CA/D 4/96 of 8 March 1996 the Administrative Council introduced, with effect from 1 January 1996, two additional steps, known as step -1 and step 0, at the beginning of each grade on the basic salary scales. The introduction of these “negative steps” applied only to staff members recruited after 8 March 1996. On 28 June 2001 the Council approved the proposal of the President of the Office to renumber the steps with effect from 1 July 2001 so that the salary scales would commence at step 1 and would end at step 13.

In April 2002 the President of the Office proposed to amend the procedure for adjusting the remuneration of permanent employees introduced in 1996 and to redefine the career system for staff members in category A. The Administrative Council endorsed the President's proposal on 7 June 2002 by decision CA/D 8/02. As a result, new salary scales were introduced, and the rules governing the assignment of a step within grade upon recruitment or promotion were modified so as to give greater scope for advancement based on merit. In view of the fact that staff members entering grade A3 under the new rules would, in some cases, obtain a more favourable grading than staff members who had been recruited or promoted to grade A3 under the previous rules, Article 7 of decision CA/D 8/02 provided for a transitional measure. That article reads in part:

“With effect from 1 January 2002 — but at the earliest as from the date on which they took up their duties — a 12-month exceptional advancement shall be granted to staff graded in A3 on 31 December 2001 or recruited in that grade after 31 December 2001 and who, on the date they entered grade A3, would have been graded more favourably according to the new scale structure or the new criteria for step-and-grade assignment on recruitment.”

In July 2002 the exceptional advancement was granted to a first group of staff members who met the requirements of Article 7. Subsequently, on 18 December 2002, the Vice-President in charge of Administration notified staff members that staff representatives had drawn the Office's attention to the situation of staff who had joined the EPO with eight years' reckonable experience and who, on recruitment, had been assigned to grade A3, step -1 (or equivalent following the renumbering of the steps). Since this group of staff would have been treated more favourably under the new rules, the Office had decided that these staff members too should be granted a 12-month exceptional advancement.

In a letter of 23 June 2003 addressed to the President of the Office, the complainant asserted that staff members recruited prior to 8 March 1996 and promoted to grade A3 on the basis of an overall rating of “good” had also been granted a 12-month exceptional advancement although decision CA/D 8/02 did not apply to them specifically. He explained that, as a result, staff members recruited after 8 March 1996, who should have been the only beneficiaries of the aforementioned decision, had lost the benefit of the “salary correction” for which it provided. Since he had been recruited after March 1996, he asked the President of the Office to grant him a 12-month exceptional advancement as from 1 January 2002 or otherwise treat his letter as an internal appeal.

The complainant was informed on 4 August 2003 that the President of the Office had decided that, in the light of decision CA/D 8/02, his request could not be granted; the matter had therefore been referred to the Appeals Committee. In its opinion of 13 March 2006 the Committee unanimously recommended that the appeal be dismissed as unfounded. Noting that the President of the Office had “scope for discretion” in implementing Article 7, it held that there could be no objection to the Office’s decision to grant the exceptional advancement, to certain staff members recruited prior to 8 March 1996 who satisfied the criteria of Article 7 and who, without being granted advancement, might have been “overtaken” in terms of step by colleagues with similar experience and staff reports. It considered that the complainant, however, was in a different situation insofar as he had been recruited after the introduction of the “negative steps” on 8 March 1996 and was not entitled, with the same reckonable experience, to a grade corresponding to that of a staff member recruited before that date. With regard to career prospects, the Committee considered that the complainant’s case was “not comparable to that of the group of persons which benefited from the transitional measure”.

By a letter of 5 April 2006 the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided to reject his appeal as unfounded, in accordance with the unanimous opinion of the Committee. That is the impugned decision.

B. The complainant asserts that the application of decision CA/D 8/02 adversely affected him because a group of staff members recruited before 8 March 1996 and promoted to grade A3 was granted a 12-month exceptional advancement whereas he was not, although he also held grade A3 at the time of the adoption of the aforementioned decision, that is to say on 7 June 2002. Consequently, he contends, he has suffered discrimination.

Referring to the Tribunal’s case law, he submits that the impugned decision was taken in breach of the principle of equality, which directs equal pay for work of equal value. He considers that the differences that exist between his situation and that of the group of staff members recruited before 8 March 1996 do not warrant the difference in treatment. In his view, it is of no importance that these staff members held a higher step in grade A3 than him since they were all in grade A3 on the date of adoption of decision CA/D 8/02, their job titles and “job merit” were identical to his, and like him, they all obtained an overall rating of “good” in their staff reports. Therefore, the defendant has not fulfilled its obligation to “equalise the effect of the inequality of treatment brought about by the application of [decision] CA/D 8/02”. Indeed, the Tribunal’s case law has it that the EPO is under an obligation to ensure that amendments authorised by the Administrative Council do not result in inequality of treatment.

According to the complainant, the President of the Office mistakenly granted a 12-month exceptional advancement to staff members recruited before 8 March 1996 as they were explicitly excluded from the scope of Article 7 of decision CA/D 8/02. He disputes the Appeals Committee’s finding that the staff members in question would have been assigned a higher step in grade A3 under the new rules. He points out that decision CA/D 8/02 was taken to remedy the measures introduced by decision CA/D 4/96, that is to say the addition of two new steps at the beginning of each grade to the salary scales for staff members recruited after 8 March 1996. Consequently, Article 7 only applies to staff members recruited after March 1996 since they alone can be considered to have been “penalised” by the implementation of decision CA/D 8/02. In support of this contention he refers to various draft documents submitted to the Council prior to the adoption of that decision.

Noting that “grade-and-step is what links seniority [...] and pay”, he submits that if the “grade-and-step is increased for some and not for others” then it no longer reflects seniority. In his view, when the link between work and pay is broken, the “reward system” becomes arbitrary. Since staff members recruited before 8 March 1996 were granted a 12-month exceptional advancement whereas he was not, the relative grade-and-step positions no longer reflect the seniority ranking and the decision not to grant him the exceptional advancement is unfair and disproportionate.

The complainant requests the quashing of the impugned decision, the granting of the 12-month exceptional advancement with retroactive effect from 1 January 2002, payment of interest on “outstanding amounts” and 7,500 euros in costs.

C. In its reply the EPO submits that the complainant’s internal appeal was irreceivable for want of a cause of action and that consequently his complaint is likewise irreceivable. It adds that neither the measures introduced by decision CA/D 8/02 nor the impugned decision had any impact on the complainant’s situation. Indeed, on 31 December 2001, the cut-off date to benefit from a 12-month exceptional advancement, the complainant held grade A2 and not grade A3 as required by Article 7 of the above-mentioned decision. Therefore, the impugned decision

cannot be considered as adversely affecting him.

On the merits it argues that the decision of the President of the Office to apply the transitional measure to staff members recruited before 8 March 1996 and promoted to grade A3 from grade A2, step 9 or above, was a discretionary decision taken on the grounds that they would have been assigned to a higher step in grade A3 under the new system. It refutes the complainant's allegation that Article 7 applies only to those recruited after 8 March 1996.

The defendant submits that there are differences between the complainant and the beneficiaries of the transitional measure warranting a different treatment. It explains that the President of the Office had decided to grant an exceptional advancement to staff members recruited prior to 8 March 1996 in order to avoid the possibility that staff promoted to grade A3 shortly before 31 December 2001 might be "overtaken" in terms of steps by colleagues with similar experience and assessments. The complainant is not in a similar situation since he was recruited after the introduction of "negative steps" and was not entitled, with the same reckonable experience, to a grading which corresponds to that of a staff member recruited before March 1996. According to the EPO, the difference justifying the dissimilarity in treatment lies in the respective "starting positions" of the staff members concerned.

Referring to the Tribunal's case law, it points out that staff members are not legally entitled to promotion on a particular date or to claim the benefit of a transitional measure for themselves. It contends that rules regarding promotion do not give rise to an acquired right and stresses that decisions concerning promotion, being discretionary, are subject to only limited review.

D. In his rejoinder the complainant reiterates his pleas. He points out that staff members hired both before and after March 1996 have received the 12-month exceptional advancement. He maintains that those recruited before March 1996 did not fulfil the requirements of Article 7 of decision CA/D 8/02. In addition, he indicates that, contrary to the defendant's assertion, he has not contended that he has an acquired right to promotion.

E. In its surrejoinder the EPO maintains its position. It emphasises that not all staff members recruited prior to 8 March 1996 benefited from the 12-month exceptional advancement, but only those who were promoted from grade A2, step 9 or above, to grade A3, and who held grade A3 on 31 December 2001. It recalls that the complainant held grade A2 on 31 December 2001 and thus did not meet the requirements of Article 7 of decision CA/D 8/02 to benefit from exceptional advancement.

CONSIDERATIONS

1. The complainant joined the Office on 1 June 2000 as an examiner at grade A2 and was promoted to grade A3 on 1 June 2002. He considers himself to be in a similar situation to that of staff members who were recruited prior to 8 March 1996 and who were promoted to grade A3 on the basis of an overall rating of "good". Like them he held grade A3 at the time of the adoption of decision CA/D 8/02 on 7 June 2002. The complainant points out that they received a 12-month exceptional advancement whereas he did not. This resulted in reducing his salary, his allowances and ultimately his pension rights.

2. The conditions in which the Organisation decided to redefine the career system for staff members in category A is explained in Judgment 2663, also delivered this day. Suffice it to say that decision CA/D 8/02, which redefines the career system, was adopted with a view to providing greater scope for advancement based on merit.

3. Staff members entering grade A3 under the new rules would, in some cases, obtain a more favourable grading than staff members who had been recruited or promoted to that grade under the previous rules. Therefore, Article 7 of decision CA/D 8/02 provided for a transitional measure, according to which a 12-month exceptional advancement would be granted to staff who held grade A3 on 31 December 2001 and who, on the date they entered grade A3, would have been graded more favourably according to the new scale structure or the new criteria for step-and-grade assignment on recruitment. It was indicated that such advancement would not affect the experience to be taken into account for the purposes of subsequent promotions.

Receivability

4. The Organisation objects to the receivability of the complaint on the grounds that, in its view, the complainant's internal appeal was irreceivable for lack of cause of action. It put forward that argument before the

Appeals Committee which considered that, since the complainant was excluded from the application of a measure which could confer direct financial benefits, his appeal was receivable.

The Tribunal concurs. It is clear that by not granting the 12-month exceptional advancement to the complainant, the Organisation took a decision which might have had an adverse effect on his situation. He was entitled to have his appeal examined on the merits; thus the Organisation's objection fails.

The merits of the complaint

5. The complainant argues that it is by mistake that a 12-month exceptional advancement was granted to staff members recruited before 8 March 1996 and who held grade A3, as they were explicitly excluded from the scope of decision CA/D 8/02. He claims that by denying him the same advancement the Office acted in breach of the principle of equal treatment. He also contends that he received less favourable treatment without reasonable ground.

6. The complainant acknowledges that there is a difference in seniority among those he considers his peers. He has less seniority than others since he joined the EPO only in June 2000 and those with more seniority received an advancement that he did not. The result is that the positions in grade and step now no longer reflect the seniority ranking. In his view, the refusal to grant him the 12-month exceptional advancement was completely "arbitrary".

7. The EPO states that the complainant was promoted to grade A3 only after the cut-off date on which one could benefit from the 12-month exceptional advancement, i.e. 31 December 2001. Consequently, he did not fulfil the requirements of decision CA/D 8/02. It also argues that the complainant, as well as the intervener, did not belong to the category of persons covered by Article 7 of decision CA/D 8/02.

8. The Tribunal recalls that the principle of equality of treatment requires that "persons in like situations be treated alike and that persons in relevantly different situations be treated differently. In most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved. Even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference" (see Judgment 2313, under 5). In order for the principle of equality of treatment to be complied with, a decision should take "fair and reasonable account" of different situations (see Judgment 2597, under 3).

9. The Tribunal also recalls that it is well settled that "the principle of equality requires the equal application of the relevant law, not its equal misapplication" (see Judgment 2556, under 13). The complainant contends that since the decision to grant exceptional advancement to staff members recruited before 8 March 1996 was taken in breach of Article 7 of decision CA/D 8/02, the same misapplication should apply to him; such a contention cannot possibly be sustained. Indeed, equality in law does not mean equality in breach of the law.

10. The Tribunal notes that the Appeals Committee in its report of 13 March 2006 found that the complainant, who joined the Office on 1 June 2000, was in an entirely different situation to that of staff members who were recruited prior to 8 March 1996 and who were granted the exceptional advancement. With regard to career prospects the complainant's situation was not comparable to that of the staff members who benefited from the transitional measure. As stated by the Committee, the complainant "was recruited after the introduction of the negative steps and [was] not entitled, with the same reckonable experience, to a grading which correspond[ed] to that of a staff member recruited before March 1996". The different treatment accorded to the complainant was therefore based on material considerations which are understandable in terms of personnel policy and which justify not applying the transitional measure to him. Accordingly the complainant's argument based on unequal treatment must be rejected.

11. The EPO does not suggest or admit that it misapplied the rules by granting exceptional advancement to some but not all staff members holding grade A3; on the contrary, it asserts that it was a proper exercise of the President of the Office's discretion. The Appeals Committee held that, in implementing Article 7 of decision CA/D 8/02, the President had discretion which was limited only insofar as the Administrative Council had defined the group of persons qualifying for exceptional advancement.

12. The question is one of exercise of discretion by the President of the Office within the boundaries of the Tribunal's case law. As stated in Judgment 2377, under 4, "[t]he Tribunal will only interfere with such exercise on very limited grounds, none of which has been established by the complainant. The fact that [contract] extensions

may have been granted to a number of other staff members is simply irrelevant in the circumstances.”

The decision taken by the EPO not to grant an exceptional advancement to the complainant was based on objective criteria and, except for those arguments already evaluated, not even an attempt has been made to prove that it was biased, or a misuse of authority, or tainted with any flaw. The decision therefore stands.

DECISION

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment, adopted on 4 May 2007, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Seydou Ba

Agustín Gordillo

Catherine Comtet