

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

107th Session

Judgment No. 2846

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr G. L. N. N. against the European Patent Organisation (EPO) on 29 December 2007 and corrected on 31 December 2007, the Organisation's reply of 17 April 2008, the complainant's rejoinder of 27 May and the EPO's surrejoinder of 17 September 2008;

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. Details concerning the complainant's career at the European Patent Office – the EPO's secretariat – may be found under A in Judgments 1590 and 2537 delivered on his first and second complaints respectively. It should be noted that the complainant – who was born on 24 March 1951 – joined the Office at grade A3 in November 1991. As from 2001 his deteriorating state of health occasioned many absences on sick leave, and on 1 December 2004 he was granted an invalidity pension.

In the case that led to Judgment 2272 an employee of the Office who had reached 50 years of age on 31 May 2000 and who by then had served for ten years at grade A3, during which time his performance had invariably been rated “good”, asked the Tribunal to order the application of the following “age-50 rule”, which the President of the Office had abandoned in 1999:

“Promotion [to the A4 grade] at age 50 will be offered to all who have served at least 5 years in the A3 grade, irrespective of their total previous experience, provided their record of work is good.”

In that judgment, delivered on 4 February 2004, the Tribunal held that this rule could not be called into question by the President because it had been approved by the Administrative Council. It therefore set aside the decision not to promote the employee in question to grade A4 as from 1 June 2000 and ordered that his promotion should take effect from that date.

In *Gazette* No. 03/2004 the Vice-President in charge of Directorate-General 4 (DG4) announced that, following Judgment 2272, the President had, “for policy reasons and without acknowledging any legal obligation to do so, decided to refer to the Promotion Board all other cases from 1999 onwards of employees who might be eligible for promotion to A4 at the age of 50, in order for the Promotion Board to recommend promotions for all those in the A3 grade who meet the criteria for promotion to A4”. The list of employees who were granted a promotion pursuant to the above-mentioned rule was published in *Gazette* No. 12/2004; the complainant’s name was not on the list.

Since he considered that he met all the requirements for such a promotion, on 15 March 2005 the complainant sent a letter to the President of the Office in which he requested, inter alia, that he be promoted to grade A4 with effect from 24 March 2001. As his request did not meet with a favourable response, it was forwarded to the Internal Appeals Committee. In its opinion of 7 August 2007 the Committee, citing a number of Tribunal judgments, stated that its power to review a decision regarding promotion was limited. It further pointed out that, pursuant to the Note from the President of the Office to the Chairmen of the Promotion Boards for the year 2001, candidates for promotion to grade A4 had to have a good record of

performance during a period of time covering at least three normal reporting periods. In the complainant's case the last reporting period to be taken into consideration, according to the Committee, was that running from 1 January 2000 to 6 September 2001, in respect of which he had received the overall rating "less than good", which "certainly did lower [his] overall performance rating", which had been uniformly good until then. The Internal Appeals Committee noted, however, that the staff report covering the period in question, which had been drawn up in July 2003, had not yet been signed by the complainant. As the report was therefore not final, and as there was also nothing in its content to indicate that the complainant might possibly obtain the rating "good", the Committee decided to follow the practice of the promotion boards and concluded that no decision on the complainant's promotion should be taken for the time being. It therefore unanimously recommended that his appeal be dismissed.

The Director in charge of Administration and Systems informed the complainant in a letter dated 28 September 2007 that the President of the Office had rejected his appeal as unfounded and that the above-mentioned staff report would be finalised and placed in his personal file. That is the impugned decision.

B. The complainant submits that the age-50 rule establishes a promotion procedure which constitutes a derogation from the normal regime and which "ties" the discretionary authority of the President of the Office, since the promotion in question must be granted, without exception, to all employees who have reached the age of 50, who have served for at least five years in the A3 grade and whose performance record is good. In support of his argument he refers to Judgments 2272 and 2344, in which the Tribunal set aside decisions refusing to grant the complainants in question a promotion based on that rule although they met all the relevant conditions. The complainant asserts that he also met these conditions and that the principle of *tu patere legem quam ipse fecisti* has been breached. Moreover, he takes the Internal Appeals Committee to task for ignoring the two above-mentioned judgments. In his opinion the judgments on which it relied in claiming that its power of review was

limited are irrelevant inasmuch as they were delivered in cases concerning “ordinary” promotions in respect of which the President of the Office has broad discretionary authority.

The complainant also points out that promotion boards are required, under Article 49(10) of the Service Regulations for Permanent Employees of the European Patent Office, to examine the personal file of candidates for promotion who satisfy the relevant requirements. He states that in March 2007 he ascertained that his personal file contained the four staff reports drawn up between 1992 and 1999 – in which he was systematically rated “good” – but that no further report had been drawn up since then. In order to justify its refusal to promote him, the Organisation produced a computerised seniority list showing that he had obtained the rating “less than good” for the period from 1 January 2000 to 6 September 2001, but the complainant casts doubt on the authenticity of this document and contends that its use is unlawful. In his opinion, retroactive application of the age-50 rule implies a reconstitution of career, which in his case should have been decided on the basis of the information that would have been available to the Promotion Board when it met in 2001. It follows that the Board should have recommended his promotion in the light of his record of work as it stood when he reached the age of 50, i.e. as reflected in the four staff reports referred to above, and should not have taken into account a subsequent rating. The complainant emphasises that his failure to sign the draft report for 2000-2001 was due to his absences on sick leave. He states that the Administration informed him that this draft had nevertheless been placed in his personal file in the course of the internal appeal proceedings and he questions the Organisation’s right to alter the content of a retired staff member’s personal file without obtaining his consent and the inclusion in the file of a staff report that has not been finalised.

The complainant holds that the Internal Appeals Committee was wrong to consider the Note from the President of the Office to the Chairmen of the Promotion Boards for the year 2001 as its “sole legal frame of reference”. As the Note made no mention of the age-50 rule, it could not have stipulated how that rule was to be applied. The

complainant casts doubt on the impartiality of the Internal Appeals Committee and claims that it should never have concluded that the decision on his promotion should be deferred until his last staff report had been finalised, since it should have realised that the draft report needed to be “heavily revised [...] because the legal conditions for a rating lower than ‘good’ were not met”. It should therefore have disregarded the draft report and proposed that he be promoted.

The complainant claims promotion to grade A4 with retroactive effect from 1 April 2001 and payment of the salary difference due since that date, together with interest at the rate of 8 per cent per annum from the date on which each monthly payment would have fallen due. He further asks the Tribunal to order the Organisation to recalculate the lump sum that he received pursuant to Article 84(1)(b)* of the Service Regulations as well as his invalidity pension, and to pay him the difference with respect to the sums that he has already received, together with interest at the same rate. Lastly, he claims costs in the amount of 2,000 euros.

C. In its reply the EPO contends that the complainant’s claim for the payment of interest from 2001 is irreceivable since he did not file an appeal in 2001 but only after the Promotion Board met in 2004.

On the merits the Organisation points out that a decision regarding promotion falls within the discretionary authority of the organisation concerned and can be set aside only under certain conditions, which are not satisfied in the instant case.

It further emphasises that, according to the Note from the President of the Office to the Chairmen of the Promotion Boards for the year 2001, a candidate for promotion to grade A4 had to have a good record of performance during a period of time covering at least three normal reporting periods. As the complainant’s overall rating for the 2000-2001 period was “less than good”, he failed to meet the conditions for promotion. Although the staff report corresponding

* This paragraph stipulates that in the event of permanent invalidity totally preventing the permanent employee from performing his duties, the latter shall receive a lump sum equal to 2.75 times his annual basic salary.

to that period had not been finalised when the Promotion Board met in 2004 and refused to recommend the complainant's promotion, the Organisation claims that this situation caused no injury to the complainant since the Board, in accordance with its consistent practice, would have reviewed the file if the ratings had been raised. It could also have decided, on the basis of the above-mentioned Note and Article 49(10) of the Service Regulations, to obtain additional information by inviting the complainant and/or his supervisor to an interview. The Organisation adds that the staff report for 2000-2001 was sent to the complainant on a number of occasions but he never signed and returned it. In view of the complainant's lack of cooperation and the fact that the report has been signed in the meantime by the Vice-President in charge of DG4, it considers that the report should now be regarded as final. As the ratings it contains have not been raised, the President of the Office concludes that the complainant does not have the "necessary qualifications" within the meaning of Article 49(7) and that she is therefore under no obligation to forward his name to the Promotion Board pursuant to Article 49(10).

Moreover, the EPO points out that the Promotion Board is in no way bound to take its decisions solely on the basis of the personal file and the staff reports that it contains. It indicates that the seniority list that it produced "comes from a database compiled by the competent department" and that the Board needs to consult it for reasons of administrative efficiency: as the latter has hundreds of cases to examine at each session, it finds it easier to work with summaries of the staff reports than with the complete documents.

D. In his rejoinder the complainant draws attention to the fact that in Judgment 2272 the Tribunal awarded interest on a sum consisting of the salary difference resulting from the amended date of promotion of the employee in question. In these circumstances he considers that the EPO's objection to receivability, which it raises for the first time in the proceedings before the Tribunal, must be rejected.

On the merits he reiterates his pleas. He asserts that, by taking account of his draft staff report for 2000-2001, the Promotion Board committed an error of law and took a flawed decision. He states that

in recommending that he should not be promoted the Board relied on a seniority list which, quite apart from the fact that it contained irrelevant information, namely that concerning the period 1 January 2000 to 6 September 2001, mentioned solely the ratings contained in the reports for 1996-1997 and 1998-1999, in other words only some of the ratings which ought to have been taken into account. This seniority list therefore reflected an incomplete and misleading view of his record of work. In his opinion, a promotion board should never consult a computerised list instead of examining a personal file. The Promotion Board, in failing to examine his personal file, “breached its obligation to exercise its discretionary authority by relying entirely on a source of information for which no provision is made in the Service Regulations”.

The complainant points out that the announcement in *Gazette* No. 03/2004 does not specify the criteria which an employee must satisfy for promotion to grade A4. These criteria are, however, to be found in the Note from the President of the Office to the Chairmen of the Promotion Boards for the year 2004, which reads in pertinent part:

- “7. Candidates in the grade A3 who have reached the age of 50 and who have at least 3 years of service with the EPO may be considered eligible for promotion to A4 if this is also supported by the individual’s merit. The promotion board is requested to consider all cases since 1999 that may be covered by these promotion criteria.
8. Staff who have received an overall marking of 4 cannot be considered for promotion until they have been rated at least 3 for all aspects of performance for at least 4 years.”

The complainant argues that since he obtained an overall rating of 4 (the equivalent of “less than good”) for the year 2000-2001 but a rating of at least 3 (the equivalent of “good”) for all aspects of his performance in his previous staff reports, the Promotion Board should have proposed his promotion pursuant to point 8 of the above-mentioned Note.

Lastly, he contends that the way in which the draft staff report for 2000-2001 was drawn up was not in accordance with the Tribunal’s case law, but that his state of health prevented him from embarking upon the conciliation procedure. He explains that in June 2007 he

lodged an internal appeal against the decision to place this draft report on his personal file.

E. In its surrejoinder the EPO reiterates its position. It maintains that it is the Note from the President of the Office to the Chairmen of the Promotion Boards for 2001 that is relevant in this case: since the complainant has requested retroactive promotion as from 1 April 2001, the applicable criteria are those which were in force at that time. It states that inasmuch as the complainant did not fulfil all the conditions for promotion under the age-50 rule, the Promotion Board was under no obligation to examine his personal file.

CONSIDERATIONS

1. In its Judgment 2272, delivered on 4 February 2004, the Tribunal held that the President of the European Patent Office had committed an error of law and abused his authority by abandoning the “age-50 rule” as from 1999. This rule, which had been applied consistently from 1981 to 1998, stipulates that promotion to the A4 grade at age 50 “will be offered to all who have served at least 5 years in the A3 grade, irrespective of their total previous experience, provided their record of work is good”.

Following that judgment the President, “for policy reasons and without acknowledging any legal obligation to do so, decided to refer to the Promotion Board all other cases from 1999 onwards of employees who might be eligible for promotion to A4 at the age of 50, in order for the Promotion Board to recommend promotions for all those in the A3 grade who meet the criteria for promotion to A4”.

2. The complainant, who was born on 24 March 1951, joined the Office in November 1991. He was granted an invalidity pension as from 1 December 2004.

On 15 March 2005, relying on the age-50 rule, he requested retroactive promotion to grade A4 as from 24 March 2001. In its opinion of 7 August 2007 the Internal Appeals Committee, to which

the matter had been referred, unanimously recommended that the appeal should be rejected.

The complainant was informed by letter of 28 September 2007 that the President of the Office had decided to follow that recommendation and to reject his appeal. That is the decision challenged before the Tribunal.

3. The complainant submits in essence that his request for promotion to grade A4 ought to have been examined on the basis of the staff reports available on 24 March 2001, the date on which he reached the age of 50. These reports covered the period 1992 to 1999 and all showed the rating “good” for quality of work done, productivity, aptitude and attitude and as an overall rating.

He contends that the Promotion Board committed an “error of law” by taking into consideration the “less than good” overall rating he was given for the period 1 January 2000 to 6 September 2001, because that rating was not established in an adversarial manner.

4. In the above-mentioned Judgment 2272, the Tribunal noted that the age-50 rule had been approved by the EPO’s Administrative Council within the framework of guidelines regulating the careers of permanent employees in categories A and L.

While this rule does not provide for the automatic promotion from grade A3 to grade A4 of all employees who reach the age of 50 and who have served at least five years at grade A3, it does oblige the Administration to grant them this promotion unless it is shown that their performance ratings are too low to justify it.

5. In his Note to the Chairmen of the Promotion Boards for the year 2001 the President of the Office stated that employees over the age of 44 with more than 19 years of recognised experience could be promoted to grade A4 provided that their record of performance had been “good” during a period of time covering at least three normal reporting periods.

The Tribunal need not determine whether this rule adopted by the President has a sound legal basis and whether the three normal reporting periods to which it refers must be the last three immediately preceding the date on which the employee in question reaches the age of 50. The criteria laid down in this Note could not, in any case, be applied automatically by the Promotion Board, which should have examined the complainant's merits individually. It is contrary to the purpose of the age-50 rule to assess an employee's merits without any regard for the overall quality of the work he/she has performed in the service of the Organisation, as reflected in his/her file as a whole.

6. In the instant case the complainant consistently obtained the rating "good" for all aspects of his performance in his staff reports between 1992 and 1999. It is true that he was given the overall rating "less than good" during the reporting period in which he reached the age of 50, but it had not been possible to finalise that rating in an adversarial manner, probably owing to the complainant's state of health at the time when he was due to sign his staff report and to add any comments he might wish to make.

In these circumstances, the Organisation could not refuse to promote the complainant; its decision constitutes an abuse of discretionary authority and must be set aside.

7. The complainant asks to be placed in the situation which would have been his had he been granted his promotion to grade A4 on 1 April 2001 and to be paid interest on the sums he contends are due to him. The Organisation objects to the receivability of this claim for interest, but its objection fails, because the complainant could not have lodged an appeal before 2004, as it was only after the delivery of Judgment 2272 that the President of the Office decided to refer to the Promotion Board the cases of employees who might have been eligible for promotion under the age-50 rule after 1999.

In these circumstances, the Organisation must promote the complainant to grade A4 with retroactive effect from 1 April 2001 and must pay him the salary difference due to him, together with interest at

the rate of 8 per cent per annum on arrears as from the date on which each monthly payment would have fallen due.

It shall also pay the complainant the difference between the lump sum which would have been paid to him had he been promoted at the proper time and that paid to him under Article 84(1)(b) of the Service Regulations, as well as the difference between the invalidity pension due to him and that computed in the absence of his promotion to a higher grade. The Organisation shall likewise pay the complainant interest on these amounts at the rate of 8 per cent as from the date on which each monthly payment would have fallen due.

8. Since he succeeds, the complainant is entitled to costs which shall be set at 2,500 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The Organisation shall pay the complainant the sums due to him which shall be calculated as specified in consideration 7, above.
3. It shall also pay him costs in the amount of 2,500 euros.

In witness of this judgment, adopted on 7 May 2009, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet