

107th Session

Judgment No. 2859

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr A. P. B. against the European Patent Organisation (EPO) on 6 February 2008 and corrected on 18 March, the EPO's reply of 30 June, the complainant's rejoinder of 22 August and the Organisation's surrejoinder of 5 December 2008;

Considering the application to intervene filed by Mr R. L. on 12 April 2008 and the EPO's comments thereon of 30 April 2008;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a Dutch national born in 1950, joined the International Patent Institute in The Hague in 1972. Following the Institute's integration into the EPO in 1978, he became an employee of the European Patent Office – the EPO's secretariat – at its branch in The Hague. He was promoted to grade B5 on 1 December 1983 and to grade B6 on 1 January 1992.

As the successful candidate in competition INT/EXT/3942 for the post of administrator in career group A1-A4 in the Directorate of Planning, Procurement & Project Support, he was informed by letter of 24 February 2005 that he had been nominated to that post and that he would be promoted to grade A2 and transferred to the new function with effect from 1 April 2005. Enclosed with the letter was the calculation of his incremental step – based on the salary scales applicable at the time of promotion – which indicated that he would be assigned to step 13 in his new grade.

In a letter of 4 March 2005 to the Director of Personnel he contested his promotion to grade A2 and requested that he be promoted to grade A3. He argued that the application of Circular No. 271, Section III (C), which stipulates that “[s]taff promoted from grade B6 are graded A2”, had resulted in a situation where his promotion did not entail a basic salary higher than that which he received at his previous grade and step and was thus contrary to Article 49(11) of the Service Regulations for Permanent Employees of the European Patent Office, according to which “a permanent employee who obtains a higher grade shall be appointed to the lowest step in the new grade which carries a higher basic salary than that received in his former grade and step increased by the equivalent of one 12-monthly incremental step in his former grade”. He added that the provisions of the Service Regulations should take precedence over those of Circular No. 271. The Director of Personnel replied by letter of 15 April that the decision to promote him to grade A2 was in line with the principles and the structure of the careers system provided for in Article 49 of the Service Regulations and the corresponding circulars, and that the Office therefore could not adopt his view on the matter.

On 30 May 2005 the complainant lodged an appeal against that decision. He maintained that his promotion to grade A2 was in breach of the Service Regulations and requested that he be promoted to grade A3 with effect from 1 April 2005. By letter of 14 June he was informed that the President of the Office had decided that his request could not be granted and that the matter would be referred to the Internal Appeals Committee. In December 2005 the Administrative

Council approved, with retroactive effect from 1 July 2005, new salary scales which increased by one cent the monthly salary corresponding to step 13 in grades A1 and A2.

The Internal Appeals Committee rendered its opinion on 17 October 2007. Relying on the Tribunal's ruling in Judgment 2624, it concluded *inter alia* that the complainant was not entitled to a promotion to grade A3 and that his promotion to grade A2 step 13 satisfied the requirements of Article 49(11) of the Service Regulations, given that his basic monthly salary had been increased by one cent and the Office had offered a compensatory payment for the interim period. It recommended unanimously that the appeal be dismissed as unfounded. By letter of 15 November 2007 the complainant was informed that the President had decided to reject his appeal. That is the impugned decision.

B. The complainant submits that his promotion to grade A2 was contrary to Article 49(11) of the Service Regulations because, under the salary scales applicable on 1 April 2005, his basic salary following promotion to grade A2 step 13 was merely equal to that which he received at grade B6 step 13, increased by the equivalent of one 12-monthly incremental step in his former grade, whereas it should have been higher than that amount. He also submits that the grade and step to which he ought to have been promoted in accordance with Article 49(11) is grade A3 step 7. That, he adds, would also have been consistent with the grading of the post to which he was nominated in career group A1-A4.

He contends that Circular No. 271, Section III (C), which served as the basis for his promotion to grade A2, contravenes Article 49(11) of the Service Regulations because it imposes upon it a limitation contrary to the evident aim of that provision, namely to ensure a minimum salary increase following promotion. In his opinion, the Service Regulations are of higher ranking than Circular No. 271 and should therefore take precedence over the latter.

The complainant also contends that his promotion to grade A2 was in breach of the principle of equal treatment, given that an external

candidate appointed to the same post could be offered a grade ranging from A1 to A4. Moreover, he asserts that the Organisation has not applied Circular No. 271, Section III (C), in a uniform manner, thereby demonstrating its willingness to deviate from it.

The complainant requests that the impugned decision be set aside, that he be promoted to grade A3 step 7 with effect from 1 April 2005 and that he be paid the corresponding difference in salary and related allowances, together with interest at the rate of 4 per cent per annum. He claims costs in the amount of 1,200 euros.

C. In its reply the Organisation submits that the complainant's promotion to grade A2 was lawful. It acknowledges that his grading at the time of his promotion did not meet the requirements of Article 49(11) of the Service Regulations due to the fact that there was then no step in grade A2 carrying a basic salary higher than that for grade B6 step 13 – the complainant's grade prior to promotion – increased by the equivalent of one 12-monthly incremental step. However, it asserts that the complainant received a compensatory payment of an additional one cent per month for the period from 1 April to 30 June 2005, which rectified the unlawful situation. Relying on the Tribunal's ruling in Judgment 2624, it asserts that the solution it adopted was fully in line with Article 49(11) of the Service Regulations.

According to the defendant, although the complainant's appointment to the post of administrator resulted from a competition, it was nevertheless a promotion and his assignment to grade A2 was rightly determined on the basis of the provisions governing promotions. There were no grounds for granting him an exceptional promotion to grade A3, especially in light of the fact that he was promoted from category B to category A, which already constituted an exceptional career development.

The EPO rejects the allegation that it acted in breach of the principle of equal treatment by placing the complainant in a position less advantageous than that of external candidates. It explains that external candidates are in a different situation, in that their professional

experience is evaluated on an individual basis and often not fully credited, or indeed, not credited at all. It dismisses as unfounded the complainant's allegation that it has failed to apply Circular No. 271, Section III (C), in a uniform manner.

D. In his rejoinder the complainant presses his pleas, whilst emphasising that his complaint is different from that leading to Judgment 2624. He considers that the offer of a compensatory payment in the amount of one cent per month for the period prior to the approval of the new salary scales – which in any event he denies having received – did not constitute a lawful or rational solution.

E. In its surrejoinder the EPO maintains its position in full and recalls that decisions on appointment and promotion are discretionary and therefore subject only to limited review by the Tribunal.

CONSIDERATIONS

1. Following his successful application for the post of administrator in the Directorate of Planning, Procurement & Project Support, the complainant was promoted to grade A2 step 13 with effect from 1 April 2005. He contested his assignment to grade A2 and requested a promotion to grade A3, arguing that the application of Circular No. 271, Section III (C), had resulted in a situation that was contrary to Article 49(11) of the Service Regulations, as his promotion did not entail a basic salary higher than that which he received at his previous grade and step. The Director of Personnel refused his request and the complainant lodged an appeal against that decision. He was subsequently informed that the President of the Office had decided to refer the matter to the Internal Appeals Committee for an opinion.

2. In December 2005 the Organisation's Administrative Council approved with retroactive effect from 1 July 2005 new salary scales which introduced a one cent increase in the monthly salaries payable for step 13 in grades A1 and A2. In its submissions the Organisation

quotes Judgment 2624 which involved a similar case against the EPO and in which it was stated that

“[o]n promotion the complainant received a salary equivalent to that received in his former grade and step (basic salary) plus one 12-monthly incremental step in his former grade. Since he was assigned to step 13, the highest in grade A2, and that Article 49(11) clearly states that any necessary higher step must be made within the new grade, in this case grade A2, the Tribunal finds that the Office’s solution of raising the basic salary of grade A2 step 13 by one cent is a rational and legal solution conforming with the requirements of Article 49(11) of the Service Regulations.”

3. In its opinion of 17 October 2007 the Internal Appeals Committee held that the appeal was admissible in its entirety but unfounded. It stated that the complainant’s request to be graded at A3 rather than A2 step 13 as a result of his promotion from grade B6 step 13 was unfounded and therefore must be refused but that he must nevertheless be granted compensation for the period from 1 April to 30 June 2005. It added that this had already been acknowledged by the Organisation in the form of an additional payment of one cent per month. The Committee also noted that in Judgment 2624 the Tribunal considered it lawful for the Office to increase the complainant’s basic monthly salary by one cent and to pay him equivalent compensation in the interim in order to fulfil the basic salary requirement of Article 49(11) of the Service Regulations. It thus concluded that “[e]ven having regard to the special circumstances of the present case cited by the [complainant], there is no reason to deviate from the above assessment of the lawfulness of the compensation. In view of the Tribunal’s findings, the [complainant’s] submissions concerning the compensation offered [...] are untenable. The judgment also makes clear that the solution now laid down in the new salary scales is lawful and, indeed, that is not disputed by the [complainant].” In a letter dated 15 November 2007 the Director of HR Administration and Systems notified the complainant of the President’s decision to endorse the Committee’s recommendation to reject his appeal as unfounded.

4. The complainant impugns that decision on the grounds of legality, breach of the principle of equal treatment and non-uniform application of Circular No. 271, Section III (C). He requests the Tribunal to set aside the impugned decision; to order the Organisation to promote him to grade A3 step 7 with effect from 1 April 2005 and to pay him the corresponding difference in salary and related allowances, together with interest at the rate of 4 per cent per annum; and to order the Organisation to pay him 1,200 euros in costs. He claims that under the salary scheme applicable on 1 April 2005, his assignment to grade A2 step 13 was not in conformity with Article 49(11) as his salary was equal to that of his previous grade and step plus one 12-monthly incremental step and that therefore he should be assigned to grade A3 step 7, which would give him a higher basic salary. He contends that his assignment to grade A2 was “a restrictive application” of Circular No. 271, Section III (C), which resulted in his suffering “discrimination [...] compared to external candidates”.

5. The Organisation submits that the complaint is unfounded and that the complainant “has been awarded valid compensation for the period from 1 April to 30 June 2005 in the form of an additional payment of one cent per month”. It argues that his grading in A2 step 13 was “lawful because it was accompanied by a **compensatory payment** to rectify the originally unlawful situation” (original emphasis) and that “[s]uch an approach does not constitute an infringement of the [Service Regulations] and there is no higher-ranking provision prohibiting the ‘one-cent solution’ adopted by the [Organisation]”. Regarding the claim for equal treatment, the Organisation denies that the complainant was treated unfairly and states that “the disadvantage at which the complainant claims to have been put in relation to external candidates cannot be regarded as unlawful discrimination” as the external candidates “are in a very different situation”. It asserts that the argument regarding the non-uniform application of Section III (C) of Circular No. 271 is unfounded.

6. The Tribunal is of the opinion that the complaint is unfounded. The Service Regulations were correctly applied by the Organisation with regard to the complainant's promotion. There was no conflict between Article 49(11) and Circular No. 271, Section III (C). The complainant's interpretation of Article 49(11) is incorrect. In Judgment 2624 – which also involved the promotion of an employee from grade B6 to grade A2 – the Tribunal ruled that “Article 49(11) clearly states that any necessary higher step must be made within the new grade, in this case grade A2”, which means that the “new grade” is not defined as the broad category of “A”, as the complainant sustains, but rather refers to the precise grade of either A1, A2, A3 or A4. As the Organisation raised the basic monthly salary of A2 step 13 by one cent and paid the complainant equivalent compensation for the period from 1 April to 30 June 2005, the Tribunal considers that the higher basic salary requirement of Article 49(11) has been satisfied (see Judgment 2624, under 6). Regarding the allegation of unequal treatment between external and internal candidates, the Tribunal notes that as the situation of the former is different to that of the latter in fact and in law, there is no ground for that allegation. In reference to the complainant's assertion that an employee was effectively promoted from grade B5 to grade A2, the Tribunal observes that this example is not one of non-uniform application of Circular No. 271, Section III (C), as the employee was in fact promoted first from grade B5 to grade B6, and then from grade B6 to grade A2 in accordance with the applicable rules and regulations.

CONCURRING OPINION BY JUDGE
AGUSTÍN GORDILLO

1. While I concur with the decision of Judgment 2624, I think that the payment of an additional one cent per month – as a form of valid compensation for the requirement that a person in a situation such as that of the complainant in that case should receive “a higher basic salary than that received in his former grade and step” – was an ad hoc temporary solution that the Tribunal found under the then

applicable Service Regulations, which are of course subject to future changes and amelioration by the Organisation. It is one thing for the Tribunal to abstain from intervening in a complex career system, as it has done so far, and quite another to pronounce its reasonableness for all time, as might apparently result from some of the findings in the present judgment.

2. If the system is not eventually changed at some appropriate time in the future the ad hoc solution of an additional one cent per month will come increasingly into question. The principles of proportionality, reasonableness, equal treatment and fairness, which are all higher-ranking general principles of law, might conceivably lead to a new approach in similar cases if the ad hoc solution is not substituted by the Organisation for another, which also takes into consideration those general principles of law.

DECISION

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment, adopted on 15 May 2009, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Mary G. Gaudron
Agustín Gordillo
Giuseppe Barbagallo
Catherine Comtet