

**109th Session**

**Judgment No. 2949**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr L. R. against the European Patent Organisation (EPO) on 7 August 2008, the EPO's reply of 17 November 2008, the complainant's rejoinder of 20 February 2009 and the Organisation's surrejoinder of 6 May 2009;

Considering Article II, paragraph 5, 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, an Italian national born in 1951, joined the International Patent Institute in 1970. 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 B4 in October of that year, to grade B5 in May 1987 and to grade B6 in May 1995.

In June 2002 Circular No. 271 was issued. Section III(C) of that circular, which applies to promotions and appointments taking effect after 31 December 2001, relevantly provides that “[s]taff appointed from grade B6 are graded A2”.

As the successful candidate in competition INT/EXT/1138 for the post of Administrator in career group A1-A4 in the Principal Directorate of Personnel, the complainant was informed by letter of 1 August 2002 that he had been nominated to that post and that he would be promoted to grade A2 with retroactive effect from 1 April. Enclosed with the letter was the calculation of his incremental step – based on the salary scales applicable on 1 January 2002 – which indicated that he would be assigned to step 13 in his new grade.

By a letter of 16 March 2005 to the Director of Personnel the complainant requested that his grade be reviewed. He challenged the applicability of Circular No. 271 and argued that it was inconsistent with 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”. Relying on an internal note of 20 January 1988 which states that the step-in-grade on promotion may not be lower than the one which would have been assigned if the promotion had occurred at a later date, he submitted that he should have been promoted to grade A3, step 7, as from 1 May 2002 in view of the fact that his basic salary following promotion to grade A2, step 13, was “exactly the same” as that which he would have received as from that date if he had not been appointed to a new post before then.

The complainant met with the Director of Personnel in May 2005 to discuss his request. Shortly thereafter, he lodged an appeal which was eventually referred to the Internal Appeals Committee. In its opinion of 2 April 2008 the Committee unanimously recommended that the appeal be rejected as unfounded. By a letter of 13 May 2008 the complainant was informed that the President of the Office had decided to follow the Committee’s recommendation. That is the impugned decision.

B. The complainant acknowledges that his grading as at 1 April 2002 met the requirements of Article 49(11) of the Service Regulations

given that, under the salary scales applicable on 1 January 2002, his basic salary following promotion to grade A2, step 13, was equal to that which he previously received at grade B6, step 12, increased by the equivalent of one 12-monthly incremental step in his former grade. However, he argues that his grading should have been reviewed on 1 May 2002 since, on that date, he would have been given an additional step if he had not been nominated to the post of Administrator, and the grade and step to which he ought to have been promoted from that date is grade A3, step 7. He notes in this respect that the post to which he was nominated was classified in career group A1-A4, without any specification as to the exact grade.

He submits that he was denied the opportunity to benefit from a career advancement as he was assigned to step 13, the highest in his new grade, and he asserts that, to the extent that it had a negative impact on his situation, the application of Circular No. 271 with retroactive effect from 1 April 2002 contravenes the principle of legal certainty. He finds fault with the Organisation for the delay in notifying him of the outcome of competition INT/EXT/1138. He further submits that, even if Circular No. 271 were applicable to his case, the limitations it imposes on Article 49(11) are inconsistent with that provision and the Service Regulations should take precedence over the circular.

The complainant alleges breach of the principle of equal treatment, drawing attention to the situation of two of his colleagues who were promoted from grade B5 to grade A2, one with retroactive effect from 1 March 2002 and the other with effect from 1 December 2007. This, he contends, demonstrates that the Organisation has not applied Circular No. 271 in a uniform manner. He emphasises that Circular No. 257, which applies to promotions and appointments from category C to category B, does not lead to arbitrary situations such as

those deriving from promotions and appointments from category B to category A.

By way of relief, he asks the Tribunal to set aside the impugned decision and to order that he be assigned grade A3, step 7, as of 1 May 2002 and that he be paid the corresponding difference in salary and allowances from that date, together with interest. He claims moral damages in the amount of 5,000 euros and costs in the amount of 2,500 euros.

C. In its reply the Organisation submits that the complaint is unfounded. It points out that determination of the grade assigned to an employee on appointment is governed jointly by Articles 3(1) and 49(9) of the Service Regulations and Circular No. 271, whereas Article 49(11) deals with the determination of the step in that grade and cannot serve as a legal basis for assigning a particular grade. It adds that, in Judgment 2624, the Tribunal confirmed that Circular No. 271, Section III(C), was consistent with that provision.

According to the defendant, Circular No. 271 was duly applied to the complainant's case as it was in force at the time when the decision to promote him was taken, i.e. 1 August 2002, and it applies to promotions and appointments taking effect after 31 December 2001. Additionally, the complainant has not shown that the Organisation intentionally delayed notifying him of the outcome of competition INT/EXT/1138.

The EPO contends that appointments from category B to category A constitute an exceptional career progression based on special merit and experience and that the provision in Circular No. 271, Section III(C), whereby employees appointed to category A from grade B6 are assigned to grade A2, is designed to ensure that these employees will not subsequently enjoy faster career progression than staff recruited directly in category A. Thus, assigning the complainant to grade A3 would have been tantamount to considering that he had more experience in category A than someone recruited directly at grade A2. Further, his appointment to grade A2, step 13,

does not preclude the possibility of career advancement given that a further promotion within category A remains possible.

It denies that it acted in breach of the principle of equal treatment. It explains that the two employees appointed from category B to category A to whom the complainant refers in his submissions were in a different situation. The first employee was mistakenly appointed to grade A2 instead of A1 and therefore his appointment does not confirm the existence of a rule nor does it confer any right on the complainant. As to the second employee, he was not directly appointed to grade A2 but consecutively from grade B5 to grade B6 and then from grade B6 to grade A2. Lastly, the EPO objects to the complainant's claim for moral damages and costs on the grounds that there is no evidence of unlawful conduct on its part.

D. In his rejoinder the complainant argues that his nomination and promotion should have been governed by the law in force at the time of publication of the vacancy notice, i.e. 21 September 2001, and that he will not enjoy a faster career progression than staff recruited directly in category A, given the age at which he joined career group A1-A4. He provides estimates which, in his view, illustrate that employees with less seniority could enjoy a faster career progression than him. He stresses that the EPO has failed to describe the procedure by which the second employee to whom he referred was appointed from grade B5 to grade A2 and he asks the Tribunal to order the Organisation to provide all documents relevant to that procedure.

E. In its surrejoinder the EPO maintains its position in full.

## CONSIDERATIONS

1. On 1 August 2002 the complainant was informed of his nomination to the post of Administrator in the Principal Directorate of Personnel with retroactive effect from 1 April 2002 at grade A2, step 13. At the time of his promotion he held grade B6, step 12. The complainant takes the position that from 1 May 2002 he should have been promoted to grade A3, step 7.

2. The complainant acknowledges that, viewed in isolation, his promotion from grade B6, step 12, to grade A2, step 13, on 1 April 2002 was a correct application of Article 49(11) of the Service Regulations. However, he argues that, since on 1 May 2002 he would have been assigned to the last step in grade B6, namely, step 13, and since the basic salary for grade B6, step 13, increased by one 12-monthly incremental step carried the same basic salary as grade A2, step 13, under Article 49(11), he should have been promoted to grade A3, step 7, from that date. He says that his basic salary on 1 May 2002 was not higher than the salary he would have received had he not been nominated to his new post before that date.

3. The Tribunal rejects this argument. Article 49(11) of the Service Regulations governs the calculation of the step-in-grade at the time of appointment to a higher grade. The language of Article 49(11) read in the context of this provision in its entirety makes it clear that the material date for the purpose of determining the appropriate step-in-grade on promotion is the effective date of the appointment. Neither Article 49(11) nor any other provision in the Service Regulations or the circulars provides for a further promotion to take account of an incremental step increase that would have been received in a previous post.

4. As the complainant concedes that the calculation of his grade and step on 1 April 2002 was accurate and in accordance with Article 49(11), there is no need to consider the additional arguments advanced in his submissions. Accordingly, the complaint must be dismissed.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 14 May 2010, Ms Mary G. Gaudron, President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2010.

Mary G. Gaudron  
Giuseppe Barbagallo  
Dolores M. Hansen  
Catherine Comtet