

111th Session

Judgment No. 3006

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr J. T. M. against the European Patent Organisation (EPO) on 13 March 2009 and corrected on 21 June, the EPO's reply of 15 October 2009, the complainant's rejoinder of 25 January 2010 and the Organisation's surrejoinder of 6 May 2010;

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 is a German national born in 1950. He joined the European Patent Office, the EPO's secretariat, as an examiner at grade A3 in October 1990. He was promoted to grade A4 in October 1997.

The Promotion Board that met in June 2005 and July 2006 to discuss promotions to grade A4(2) examined the complainant's case but did not recommend that he be promoted. The President of the Office endorsed the Board's recommendation on both occasions. Consequently, the complainant's name did not appear on the lists of promoted employees published in July 2005 and October 2006. The

complainant lodged two internal appeals, the first on 30 September 2005 and the second on 8 January 2007, against the implicit decisions not to promote him to grade A4(2) in 2005 and 2006, respectively. These appeals were subsequently referred to the Internal Appeals Committee.

The Promotion Board met again in July 2007 to discuss promotions to grade A4(2). On this occasion, it recommended that the complainant be promoted with effect from 1 April 2007. The President decided to endorse this recommendation and the complainant was informed accordingly on 8 August 2007. On 29 October he filed a third internal appeal, challenging the effective date of his promotion. This appeal too was subsequently referred to the Internal Appeals Committee.

The Committee examined the appeals jointly and rendered its opinion on 10 October 2008. It held that the first appeal should be dismissed as unfounded, but that the second and third appeals should be allowed in part, on the grounds that a breach of the principle of equal treatment could not be ruled out with regard to the Promotion Board's examination of promotions to grade A4(2) in 2006 and 2007. The Committee found in particular that, as the Board did not have at its disposal the candidates' staff reports, it was not clear whether it had sufficiently considered the fact that, following a conciliation procedure, the complainant's marking for aptitude in his 2004-2005 staff report had been raised in November 2007 from "very good" to "outstanding". It recommended that the Promotion Board re-examine the complainant's case and determine whether he was eligible for promotion to grade A4(2) at an earlier date. It also recommended that, within reason, half of the complainant's costs be borne by the Office.

The President decided to endorse the opinion of the Internal Appeals Committee. By a letter of 16 December 2008, which is the impugned decision, the complainant was informed that his case would be sent back to the Promotion Board, without prejudice to its discretion, in order for it to review the date of his promotion to grade A4(2). Having reviewed the complainant's case at its meeting of 17 and 18 September 2009, the Board found that there had not been a

breach of the principle of equal treatment and confirmed that the effective date of the complainant's promotion should be 1 April 2007. The complainant was notified accordingly by a letter of 30 March 2010.

B. The complainant criticises the Promotion Board for the manner in which it examines the merits of candidates eligible for promotion prior to making its recommendations to the President of the Office. He argues that since the Board has not established a general practice for assessing the merits of eligible candidates and has no specific criteria for doing so, or at least, none that are publicly known, its recommendations may give rise to arbitrary decisions, which cannot properly be reviewed by the Internal Appeals Committee.

He contends that in examining his case the Promotion Board did not assess his merits by comparison to those of other eligible candidates, but rather chose to conduct a case-by-case assessment and refrained from providing any ranking or any reasoning to support its recommendation. By so doing, not only did it fail to respect the principle of equality, but it also contravened the provisions of Article 49(10) of the Service Regulations for Permanent Employees of the EPO and the President's Note to the Chairmen of the Promotion Boards for the years 2005, 2006 and 2007, respectively, all of which require that the Board's recommendation be based on a comparison of the eligible candidates' merits.

The complainant also points out that during its examination in 2007 the Promotion Board considered only the promotion report and seniority list for 2006, omitting the candidates' staff reports. As a result, it failed to take into account the fact that his marking for aptitude in his 2004-2005 staff report had been raised from "very good" to "outstanding". This, in his view, constitutes an error of law on the part of the Promotion Board, which ought to have examined his case in 2007 on the basis that his amended staff report should already have been taken into account during its 2006 examination. He further argues that since the Board only took account of his deputising and tutoring experience it did not fully consider his particular merit, within the meaning of Section III.B, of Circular No. 271 – which circular sets

out guidelines for the implementation of the career system for category A, and also for promotion. He contends that a mere comparison of his staff report markings with those of the candidates who were recommended for promotion reveals that the latter did not demonstrate particular merit any more than he did and that, consequently, the Board's recommendation was purely arbitrary. By reference to a number of cases in which staff members were promoted to grade A4(2) after eight years, eight years and six months and nine years in grade A4 respectively, he argues that he should not be required to serve in grade A4 any longer than these staff members before his promotion to grade A4(2) takes effect.

Moreover, the complainant explains that, in accordance with the guidelines in force at the time of his recruitment, he was credited with only 12 years of reckonable previous experience, although the total length of his professional activity amounted to 13 years and ten months. Relying on Circular No. 271, Section IV(1)(b), which provides that staff whose reckonable previous experience was limited to 12 years on the date of their recruitment shall have their full experience recognised for the purposes of promotions taking effect after 31 December 2001, he now seeks recognition of his experience in its entirety through the award of a higher step-in-grade. Failure to grant him this would, in his view, amount to discrimination or a lack of equal treatment.

The complainant asks the Tribunal to set aside the impugned decision and to order the EPO to promote him to grade A4(2) with effect from 1 October 2005 or, alternatively, with effect from 1 April or 1 October 2006. In addition, he requests that his promotion be further advanced by one year and ten months pursuant to Circular No. 271, Section IV(1)(b). He also requests that he be paid retroactively the difference between the salary he received and that which he would have received had he been promoted to grade A4(2) at any of the aforementioned dates. He claims interest on that amount, and costs.

C. In its reply the EPO states that it considers the complaint to be receivable not only in respect of the impugned decision but also in

respect of the final decision that followed the Promotion Board's review of the complainant's case.

On the merits, the Organisation recalls that as decisions concerning promotion to grade A4(2) are discretionary and exceptional, they are subject to only limited review by the Tribunal, and employees may not claim a right to be promoted, much less a right to be promoted on a particular date. It explains that the criteria for promotion to grade A4(2), namely five years' experience in grade A4 and particular merit, are laid down in Circular No. 271, Section III.B, and must not be confused with the guidelines that the Promotion Board has elaborated over time for assessing particular merit, which are not published, because the Organisation's discretionary authority would otherwise be compromised.

The EPO denies that the manner in which the Promotion Board examines the merits of eligible candidates precludes appropriate review of promotion decisions. It submits that the Board complied with the requirements of Article 49(10) of the Service Regulations and the President's Note to the Chairmen of the Promotion Boards for the years 2005, 2006 and 2007, respectively, and that the ranking of the candidates was shown through the effective date of promotion, which varied depending on their particular merit.

The Organisation submits that, contrary to what the complainant may contend, his particular merit was fully considered. Indeed, all the duties which he had assumed, both regular and special, were taken into account, given that they were listed in his staff reports which were considered by the Promotion Board. It refutes the assertion that the Board did not carry out a comparative assessment of the complainant's case alongside those of other candidates, or that it committed an error of law. It considers that there was no substantive flaw in the Board's recommendations for 2005 and 2006, since the Board had been provided with the seniority list as well as the staff reports. It acknowledges that in 2007 the Board omitted to consider the staff reports of candidates eligible for promotion in 2006, but points out that the Board was nevertheless informed that the complainant's staff report for 2004-2005 had been amended, and this was taken into

account in determining the date of his promotion. In any event, this omission was rectified when the President referred the case back to the Board.

The defendant further asserts that, as confirmed by the Internal Appeals Committee, Circular No. 271, Section IV(1)(b), does not apply to promotions to grade A4(2), because such promotions are not based on reckonable previous experience but on the demonstration of particular merit. It thus dismisses the allegation of unequal treatment, arguing that the complainant's case was not similar to cases of promotions made on the basis of reckonable experience.

As the complainant has put forward different dates in connection with his claim for an earlier promotion, it is unclear to the EPO what his precise claim is in that respect. Regarding the claim for costs, the Organisation invites the Tribunal to dismiss it as unsubstantiated, noting that the complainant has already been paid half of the costs he incurred in the course of the internal appeal proceedings.

D. In his rejoinder the complainant explains that the reason he filed a complaint without awaiting the review of his case by the Promotion Board was that the impugned decision set off a time limit with which he had to comply in order to preserve his right of recourse to the Tribunal.

There is no justification, in his view, for the EPO's refusal to apply Circular No. 271, Section IV(1)(b), to promotions such as his, i.e. from grade A4 to grade A4(2), and he maintains that the Promotion Board's examination did not fulfil the requirements of Article 49(10) of the Service Regulations. He invites the Tribunal to examine, on the basis of the available data, his request for an earlier promotion to grade A4(2) and to award him costs in the sum of 2,843.31 euros.

E. In its surrejoinder the Organisation submits that, by inviting the Tribunal to examine his request for an earlier promotion to grade A4(2), the complainant is in fact asking it to assess his merits. It argues that such a request cannot be granted because, as a firm line of

case law confirms, it is not for the Tribunal to conduct an assessment of the complainant's merits. It otherwise maintains its position in full.

CONSIDERATIONS

1. The complainant was promoted to grade A4 on 1 October 1997. He was informed on 8 August 2007 that he had been promoted to grade A4(2) with effect from 1 April 2007, effectively after nine years and six months in grade A4. His name had been put on the relevant seniority lists for advancement to grade A4(2) considered by the Promotion Board in 2005 and 2006. The Board did not recommend his promotion in either of those years and, when his name did not appear in the lists of those promoted, he lodged internal appeals. Following his promotion in 2007, the complainant asked for reasons for his not having been promoted from a date earlier than 1 April of that year and, again, lodged an internal appeal. The three appeals were heard together.

2. The Internal Appeals Committee recommended that the second and third appeals be allowed in part, that the matter be re-examined by the Promotion Board to ascertain "the earliest possible date [he] was eligible for promotion", that he be paid half of his costs, but that otherwise his appeals be dismissed. The President accepted those recommendations and the complainant was so informed on 16 December 2008. The complaint was filed on 13 March 2009. At its meeting of 17 and 18 September 2009, the Promotion Board reviewed the complainant's case and recommended that 1 April 2007 be confirmed as the date of his promotion. The President accepted that recommendation and the complainant was so informed on 30 March 2010. In these circumstances, it is appropriate to treat the complaint as encompassing that decision as well as the earlier decision of 16 December 2008.

3. Guidelines for the implementation of the career system for category A, and also for promotions, are set out in Circular No. 271, issued in June 2002. Those guidelines differ from those previously

contained in Circular No. 144 and considered in Judgment 2140. Section I of Circular No. 271 provides that “[a]ctivity prior to recruitment [...] is credited for step-in-grade assignment and career development purposes in accordance with the rules [set out in that circular]”. When the complainant joined the EPO his reckonable previous experience was limited to 12 years. It is not disputed that the guidelines in Circular No. 271 now require reckonable previous experience to be taken fully into account. In this regard, the guidelines were amended in 2007 to provide that “[s]taff whose ‘reckonable previous experience’ was [formerly] limited to 12 years [...] will have their full experience recognised for the purposes of promotions and appointments taking effect after 31 December 2001”. In the complainant’s case his reckonable previous experience is 13 years and ten months. On this basis, he argues that his promotion must be backdated by one year and ten months from whatever the effective date should otherwise be. It is convenient to deal with this aspect of his claim before considering his other arguments directed to obtaining a promotion date prior to 1 April 2007.

4. As previously indicated, Circular No. 271 specifies that reckonable previous experience is to be taken into account “in accordance with the rules” set out in that document. Those rules fall into three sections. The first section consists of rules relating to the calculation of reckonable previous experience. The second is concerned with “Grade and step on recruitment”, and the third with “Obtaining a higher grade”. Only the latter rules, contained in Section III, are relevant to the complainant’s argument. Section III.A concerns “Promotion to grades A2, A3 and A4”. It is provided therein that “Promotion to grades A3 and A4 [...] is based on merit and experience”. Section III.B which is headed “Promotion to A4(2)” provides:

“Promotion to A4(2) may occur at the earliest after 5 years in grade A4. It is reserved for staff who have demonstrated particular merit, either in their main duties or for example by taking on special duties such as training tutoring, deputising for the director, project management, etc.”

5. In the light of the specific provision with respect to experience in Section III.A of Circular No. 271 dealing with promotion to grades A2, A3 and A4, and the specification in Section III.B that promotion to A4(2) is “reserved for staff who have demonstrated particular merit”, it must be concluded, as it was by the Internal Appeals Committee, that reckonable previous experience is not a factor to be taken into account either in relation to promotion to grade A4(2) or to the date on which that promotion occurs. Nor is it correct, as the complainant argues, that failure to take reckonable experience into account for promotion to grade A4(2) involves discrimination or a lack of equal treatment. His argument in this respect is that, as full reckonable previous experience is now taken into account for promotion from grade A3 to grade A4, there is discrimination against those members of the class whose reckonable previous experience was limited to 12 years and who are eligible for promotion to A4(2). In this regard, it is sufficient to observe that a difference in grade is a relevant difference that justifies different treatment, including with respect to the rules and considerations relating to promotion to different grades, and particularly to higher grades.

6. Before turning to the complainant’s other arguments, it is convenient to observe that in each of the years 2005, 2006 and 2007 the President forwarded a Note to the Chairmen of Promotion Boards along with the list of those eligible for promotion. In each year, the Note stated in relation to promotion to A4(2):

“[Y]our board is asked to assess ‘particular merit’ on the basis either of staff reports or, if your board requires this, of a detailed report, drawn up by the reporting officer and signed by the countersigning officer, which shows that the staff member has undertaken special duties outside the normal A1/A4 career.”

and

“Your board may recommend a retroactive promotion with effect from a previous year if this is justified on the basis of staff reports or information relating to promotion which were not available to the previous promotion boards.”

7. Assessment of merit is an exercise that involves a value judgement. It is usual to refer to decisions or recommendations involving a value judgement as “discretionary”, signifying that persons may quite reasonably hold different views on the matter in issue and, if the issue involves a comparison with other persons, they may also hold different views on their comparative rating. The nature of a value judgement means that point-to-point comparisons are not necessarily decisive. Moreover, because of the nature of a value judgement, the grounds on which a decision involving a judgement of that kind may be reviewed are limited to those applicable to discretionary decisions. Thus, the Tribunal will only interfere if “the decision was taken without authority; if it was based on an error of law or fact, a material fact was overlooked, or a plainly wrong conclusion was drawn from the facts; if it was taken in breach of a rule of form or procedure; or if there was an abuse of authority” (see Judgment 2834, under 7).

8. The main argument advanced by the complainant is that the Promotion Board’s consideration of his case in each of the years 2005, 2006 and 2007 involved a violation of the principle of equality. This argument is substantially based on the opinion of the Internal Appeals Committee. The Committee requested background information on six cases involving promotion to A4(2) which, it said, “it had not been able to clarify during the hearing and which it considered relevant with regard to the principle of equal treatment”. One of the cases involved a promotion to grade A4(2) in 2005 and the others involved promotions in 2006 and 2007. In two cases, promotion was effective after eight years of service in grade A4, in another after eight years and six months, and in the other three after nine years. The Committee found that in the first case, a promotion in 2005 after eight years, the box markings in the staff reports of the person promoted were inferior to those of the complainant, that in three cases, where promotion took place after nine years, the complainant’s box markings were better, and that of the other two cases, one involving promotion after eight years and six months, “may [...] have been within the scope for judgement evaluation”, and in the other, involving promotion after eight years,

“the candidate’s picture of performance was by no means significantly better than the [complainant’s]”. The Committee held, by reference to Judgment 2221, that the “broad discretion in respect of the exceptional promotion [to A4(2) was] limited by the principle of equal treatment”, and that a breach of that principle “ha[d] possibly occurred” in 2006 and 2007, but not in 2005. In relation to the comparison case in 2005, the Committee stated that it fell “outside the regular promotion standards” and the complainant could not invoke the principle of equal treatment in relation to that case as there was “no equality in injustice”. It also stated that in the year 2005 the complainant did not meet the “strict practice” of an unqualified “very good” performance report for the previous three reporting periods.

9. The complainant contends that there was no error in the promotion in 2005 of the person whose box markings were inferior to his. And by reference to that case and the other five cases considered by the Internal Appeals Committee, he argues that his promotion should have taken effect respectively after eight years in A4, that is 1 October 2005, or after eight years and six months, that is 1 April 2006, or at the latest, after nine years, that is 1 October 2006. It is not clear that the Committee’s view that there was a strict practice of promoting only those who had received an unqualified “very good” performance report for the three previous reporting periods is correct. There is no support for the view in the relevant guidelines or Notes and, at best, it is simply an assumption that the comparison promotion in 2005 involved an error. However and for reasons that will later appear, that is not a matter that need be pursued.

10. Although the complainant may well be correct in his contention that there was no error in the promotion in 2005 of the person whose box markings were inferior to his, he is not correct in his argument that comparison with the six cases considered by the Internal Appeals Committee entitles him to promotion after the same period of service in A4, namely, eight years, eight years and six months, or nine years. That argument assumes that a point-to-point comparison of box markings is the only basis on which comparative merit may be

assessed. However, and as already indicated, the nature of a value judgement with respect to merit is such that a point-to-point comparison is not necessarily determinative. Further, as the EPO points out, comments in the staff reports may indicate that a particular marking should be treated as approaching either a higher or lower marking or the markings may reveal an improving or declining trend. Moreover, reference solely to box markings does not indicate whether and to what extent particular candidates for promotion have, in terms of Circular No. 271, “tak[en] on special duties such as training, tutoring, deputising for the director, project management, etc”. Thus, a simple comparison of box markings does not establish a breach of the principle of equality. Moreover, Judgment 2221, to which it will be necessary to refer in greater detail, does not provide any basis for an approach based solely on comparison of box markings.

11. Before turning to Judgment 2221, it is convenient to note that the complainant also contends that not all of his “merits” were taken into account in the relevant years and that the Promotion Board considered only his duties as deputy and tutor. However, the EPO points out that all his regular and special duties were listed in his staff reports. Accordingly, the complainant’s claim in this regard is not established.

12. Judgment 2221 was concerned with different guidelines for promotion to grade A4(2) which specified, amongst other things, that those eligible for promotion should have “a record of at least ‘very good’ over a period of at least 5 years”. In that case, the complainant’s staff report for the period 1994-95 showed “good” until subsequently amended in 2000. The effect of that amendment was that the complainant satisfied the eligibility requirement in 1998. However, his name was not included in the list of those eligible for promotion until 2000. He was in fact promoted with effect from 1 April 2000. The Tribunal held in that case that the principle of equality required that his promotion be considered on the basis of what would have happened if his name had gone forward in 1998 and, if he would not then have been promoted, what would have happened if his

name had gone forward in 1999. In the result the Tribunal remitted the matter to the President to ascertain “whether the complainant would have been recommended for promotion earlier than 1 April 2000 if his 1994-95 staff report had always been in its [amended] form”.

13. The position of the complainant in this case is similar to that considered in Judgment 2221. His 2004-2005 staff report was amended in 2007 to show “outstanding” rather than “very good” for aptitude. It appears from a note made by one member of the Promotion Board that the Board was aware of this in 2007. However, it could not have been aware of this in either 2005 or 2006. Moreover, it is clear that when the Board considered the complainant’s case in 2007, it did not have before it the staff reports of those promoted in 2006 and, thus, could not have compared the complainant’s staff reports with those of the persons promoted in that year. The principle of equality requires that all candidates in a given year be assessed by reference to staff reports for the same period. It is clear from Judgment 2221 that the principle also requires that if the “merits” of a candidate for promotion are subsequently upgraded, the question of promotion must be considered on the basis of what would have happened if the upgraded marking had been considered previously.

14. It is not clear whether those promoted in 2005 were assessed for promotion by reference to their staff reports for 2004-2005. If they were, then it was incumbent on the Promotion Board in 2007 to consider whether the complainant would have been promoted in 2005 if his staff report for 2004-2005 had then been in its present form. And in that exercise, it would have been necessary to compare the complainant’s staff reports, including the amended 2004-2005 staff report, with the staff reports of those promoted in 2005. Certainly, it was incumbent on the Board to consider whether the complainant would have been promoted in 2006 if his staff report had then been in its present form by comparing the complainant’s staff reports, including his amended 2004-2005 staff report, with the staff reports of those who were promoted in 2006.

15. As already indicated, the Promotion Board has again considered and affirmed the date of the complainant's promotion as 1 April 2007. When it met for this purpose in 2009, the Board apparently considered the staff reports of the five staff members promoted in 2006 and 2007 and referred to in the Internal Appeals Committee's report. However, it is not clear that the Promotion Board did more than assess the merits of the complainant along with those of the other five staff members to determine whether the complainant's promotion should be backdated to ensure some sort of consistency with the period served by those other staff members in grade A4 before their promotions to grade A4(2) took effect. And, of course, there was no comparison with those staff members promoted in 2005, an exercise dictated by the principle of equality if those then promoted were assessed on the basis of their 2004-2005 staff reports. In these circumstances, the complaint must be upheld and the matter remitted to the President of the Office to determine the complainant's internal appeal by ascertaining whether the complainant would have been recommended for promotion earlier than 1 April 2007 if his 2004-2005 staff report had always been in its present form. As already pointed out, that involves a comparison of his staff reports, including his amended 2004-2005 staff report, with the reports of those promoted in 2006 and, if those promoted in 2005 were assessed on the basis of their 2004-2005 staff reports, the same comparison must be made with the staff reports of those then promoted.

16. As the complainant has succeeded in part in his claims, there will be an order for costs in the amount of 1,000 euros. The complainant has not succeeded in his claim with respect to his reckonable previous experience. Accordingly, the Tribunal will not order the payment of additional costs with respect to his internal appeal.

DECISION

For the above reasons,

1. The decisions of 16 December 2008 and 30 March 2010 are set aside.
2. The matter is remitted to the President of the Office to determine the complainant's internal appeal by ascertaining whether the complainant would have been recommended for promotion earlier than 1 April 2007 if his 2004-2005 staff report had always been in its present form.
3. The EPO shall pay the complainant costs in the amount of 1,000 euros.
4. The complaint is otherwise dismissed.

In witness of this judgment, adopted on 20 May 2011, 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 6 July 2011.

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