

112th Session

Judgment No. 3059

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr P. A. against the European Patent Organisation (EPO) on 31 July 2009 and corrected on 28 September 2009, the EPO's reply of 8 January 2010, the complainant's rejoinder of 29 January, the Organisation's surrejoinder dated 12 May 2010, the complainant's additional submissions of 5 October 2011 and the EPO's final comments dated 28 October 2011;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. Facts relevant to this case are to be found in Judgment 2580, delivered on 7 February 2007, concerning the complainant's fourth complaint. Suffice it to recall that the complainant joined the European Patent Office – the EPO's secretariat – in January 1980 as a patent examiner at grade A1. He was promoted to grade A2 in January 1981, to grade A3 in January 1985 and to grade A4 in January 1995.

He retired on invalidity grounds on 1 December 2005 after a Medical Committee had determined that he was permanently unfit to perform his duties.

In a letter of 26 January 2006 addressed to the then President of the Office, the complainant contended that, as a result of the harassment that he had endured for many years, which he had reported on numerous occasions, his chances of being promoted before he was obliged to retire on invalidity grounds had been destroyed. He explained in detail how, by deliberately underrating his performance, by delaying his staff reports and by relieving him of certain special duties, his supervisors had ensured that he would not be able to satisfy the requirements for promotion to grade A4(2). He asked the President to promote him to grade A4(2) with retroactive effect from 1 January 2001 “with arrears and interest”, to impose sanctions on certain staff members on account of their failure to address the harassment that he had reported, to ban certain staff members from countersigning staff reports, to issue a formal apology, and to award him moral damages and costs. By a letter of 21 March 2006 he was informed that, following an initial examination of his requests, the President considered them to be totally unfounded, and that the matter had therefore been referred to the Internal Appeals Committee for an opinion.

The complainant attended a hearing before the Committee on 30 March 2009. On that occasion he indicated that he was now claiming retroactive promotion as indicated above, an apology for the behaviour of his supervisors addressed to all staff of the Office, moral damages in the amount of 20 euros per day from 1 January 2001 until the date on which a decision was taken on his claim for promotion, and reimbursement of travel expenses, postage and copying costs and “procedural” costs.

In its opinion issued on 15 May 2009 the Committee recommended that his appeal be dismissed. It considered that his claim for an apology was, by its very nature, inadmissible, and that, with the exception of his claim for travel expenses incurred for the

purpose of attending the hearing, his remaining claims were unfounded. The Committee pointed out that, at the material time, for promotions to grade A4(2) it was standard practice for the Promotion Board to require at least an unqualified overall rating of “very good” in the staff reports for the previous five years. The complainant had not obtained that rating in all of his staff reports for the period at issue, some of which had been the subject of a conciliation procedure, and as he had not lodged a timely appeal against those reports, or against the decisions taken after the conciliation procedures, the reports had become final. Consequently, the fact that he had not been promoted to grade A4(2) was justifiable on the basis of his staff reports. The Committee added that, even if his staff reports had all been of the required standard, there was no guarantee that he would have been promoted, as not only was there no right to promotion, but the complainant had not established that he had demonstrated the “particular merits” required for promotion to grade A4(2).

By a letter of 13 July 2009 the complainant was informed that the President had decided to dismiss his appeal in accordance with the Committee’s recommendations. That is the impugned decision.

B. The complainant submits that it is because of the harassment to which he was subjected, particularly by his immediate supervisor, that he was never recommended for promotion to grade A4(2), despite the fact that he satisfied all the criteria for promotion to that grade as early as 1 January 2001. He states that he reported the actions of his immediate supervisor on numerous occasions, not only to his second-level supervisor but also to other senior managers, but nothing was done to put an end to the harassment. Thereafter, his immediate and second-level supervisors did not assess his performance with the requisite objectivity and, as a result, some of the ratings in his staff reports were reduced from “very good” to “good”. Furthermore, they delayed the completion of certain reports and took away some of his functions. According to the complainant, these actions were in fact calculated to ensure that he would be unable to meet the requirements for promotion to grade A4(2).

The complainant also criticises the Chairman of the Promotion Board, who was well aware of the harassment he was suffering, for failing to recommend him for a promotion, despite the fact that in his Note to the Chairmen of the Promotion Boards for 2004, the President of the Office had invited the Chairmen to draw his attention to cases that deserved promotion. Lastly, he argues that he is disadvantaged by the fact that the Tribunal is now the only legal remedy available to him.

He claims promotion to grade A4(2) with effect from 1 January 2001; payment of the remuneration arrears due to him as a result of that promotion, with interest; moral damages in the amount of 20 euros per day from 1 January 2001 until the date of the judgment; and costs. He also requests an oral hearing.

C. In its reply the EPO recalls that, according to the case law, promotion decisions, being discretionary in nature, are subject to only limited review by the Tribunal. It draws attention to the fact that the criteria for promotion to grade A4(2) are restrictive: such a promotion may only occur after five years in grade A4 and it is reserved for staff who have demonstrated particular merit. Moreover, it can only be decided on a recommendation of the Promotion Board. The Organisation acknowledges that the complainant had served the requisite number of years in grade A4, but it submits that he did not present any information as to what his particular merits might be.

According to the defendant, the decision not to recommend the complainant for promotion to grade A4(2) was based on his staff reports, which it was entitled to take into account in accordance with the President's Note to the Chairmen of the Promotion Boards for 2005. As the complainant did not challenge the reports in question within the applicable time limit, they have become final, and his allegations concerning his supervisors' failure to assess his performance in an objective manner are therefore irrelevant.

The EPO considers that the complainant's allegations regarding the Chairman of the Promotion Board are unsubstantiated. It points

out that recommendations for promotion are decided by a board comprising several members and that, under Article 49(5) of the Service Regulations for Permanent Employees of the European Patent Office, the Chairman cannot vote on the substantive aspects of a promotion. Likewise, it rejects his criticism of the legal remedies available to him, which it considers to be entirely adequate.

Lastly, the Organisation submits that there are no grounds for an award of moral damages in this case, as there has been no unlawful action on its part and the complainant has not proved any “especially grave moral prejudice” within the meaning of Judgment 450.

D. In his rejoinder the complainant presses his pleas, emphasising that, although promotion decisions are discretionary, they must not be arbitrary. He adds that the delay in dealing with his internal appeal provides a further justification for his claim for moral damages.

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

F. In his additional submissions the complainant produces a letter dated 28 September 2011 informing him of the President’s decision, based on an opinion of the Medical Committee, to reintegrate him as an active employee with effect from 1 October 2011.

G. In its final comments the EPO states that the complainant’s additional submissions contain no element liable to modify its position.

CONSIDERATIONS

1. The complainant retired from active service with the EPO on grounds of invalidity on 1 December 2005 but has now been reintegrated with effect from 1 October 2011. As at 1 December 2005, he had attained grade A4, step 13. He filed an internal appeal on 26 January 2006 in which he claimed promotion to grade A4(2) with effect from 1 January 2001, as well as consequential and other

relief. The Internal Appeals Committee was of the view that, so far as concerns the question of promotion and consequential relief, his appeal was admissible but unfounded. The President of the Office accepted that recommendation and the complainant was so informed by a letter dated 13 July 2009.

2. So far as concerns the admissibility of the complainant's internal appeal, it is convenient to note that promotion was not precluded at any time prior to the complainant's retirement and, according to the Note relating to promotions in 2005, promotion could, in certain circumstances, have been backdated. Moreover, the thrust of the complainant's arguments was that he had been the victim of long-term harassment until 1 December 2005 and that it was as a result of that harassment that he had not been promoted to grade A4(2). It was on the basis of his claim of long-term harassment that the Internal Appeals Committee accepted that the internal appeal was admissible and that conclusion is not now challenged by the EPO. However, it should be noted that the decisions not to promote the complainant in the years 2001, 2002, 2003 and 2004 were not the subject of internal appeals and, thus, the only question is whether the complainant should have been promoted in 2005 and his promotion then backdated to 2001.

3. Article 49(1) of the Service Regulations allows for promotion to the next highest grade within a group of grades within the same category. Subject to an exception that is not presently relevant, Article 49(4) of the Regulations requires that the President take a decision on promotion "after consultation of [...] the Promotion Board" and Article 49(10) requires the Board to draw up a list of persons in order of merit, based on a comparison of their merits, together with a reasoned report. Until 2002, promotion to A4(2) was limited to staff who had reached the final step in grade A4 and had reached the age of 55. Thereafter, promotion was possible after five years in grade A4. In this regard, Section III(B) of Circular No. 271 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.”

Under paragraph 10 of the President’s Note relating to promotions in 2005, the Promotion Board was entitled to have regard to staff reports to assess the particular merits of those being considered for promotion. Moreover, paragraph 12 of that Note allowed the Board to draw the President’s attention to candidates who, although they did not entirely satisfy the criteria specified in Circular No. 271, should, nonetheless, be considered for promotion.

4. It is not in dispute that the complainant had completed five years of service in grade A4 by 1 January 2001. Nor is it in dispute that, as a result of a conciliation procedure relating to his staff report for 2000-2001 that was completed on 4 August 2004, the complainant was eligible to be considered for promotion in 2005. The complainant received an overall rating of “very good” in his staff reports in 1998 and 1999, with individual box markings of “good” for quality and aptitude. He received an overall rating of “good” in 2000-2001 and, again, in 2002-2003. As already mentioned, the report for 2000-2001 was the subject of a conciliation procedure, but this did not lead to agreement and his overall rating remained unchanged. The complainant also asked for conciliation with respect to his report for 2002-2003 but the procedure was never brought to an end. He did not lodge internal appeals with respect to the reports for any of the years 1998 to 2003. In February 2006 the Personnel Administration Department asked the complainant whether, in view of his retirement on grounds of invalidity, he wanted a staff report prepared for the years 2004-2005 but, apparently, he did not reply.

5. In its opinion of 15 May 2009 the Internal Appeals Committee noted that, although not expressly required by the President’s Note relating to promotions in 2005, it was standard practice in that and earlier years for the Promotion Board to require at

least an unqualified rating of “very good” for the previous five years before recommending promotion to A4(2). The complainant does not dispute this. Moreover, it is implicit in his argument that he had not satisfied the formal criteria required by the Board before recommending promotion. This, he claims, was the result of the harassment to which he had been subjected since at least 1999, including by his direct supervisor. On several occasions he drew his direct supervisor’s behaviour to the attention of various persons in positions of authority within the EPO, including his second-level supervisor. His direct supervisor was aware of his actions in this regard. The complainant contends that, because of this, his supervisor was not objective in his rating of his performance and he cites his “unfair” assessments as aspects of his harassing behaviour. The complainant also contends that his second-level supervisor, who failed to take appropriate action in response to his complaints against his immediate supervisor, was neither fair nor objective in her assessment of his performance. Moreover, he claims that he was stripped of certain of his functions and denied an opportunity to perform special duties that would have enabled him to qualify for promotion to A4(2). He claims that the actions taken in this regard not only constituted harassment, but were taken for the specific purpose of preventing his promotion.

6. The Chairman of the Promotion Board was one of the persons whom the complainant informed of his claims of harassment. The complainant argues that the Chairman, of his own motion, should have recommended him for promotion as permitted by the various Notes relating to promotion in the years 2002 to 2005. He also claims that the Chairman was prejudiced against him. There is no evidence to support this claim of prejudice and it must be dismissed. And, as Article 49(5) of the Service Regulations provides that the Chairman can only vote on questions of procedure or in the case of an equality of votes, there is no basis for the claim that he had a duty to recommend the complainant’s promotion of his own motion. Accordingly, that claim must also be dismissed.

7. The primary issue raised by the present case is whether, by raising a claim of long-term harassment, the complainant can go behind his performance reports and, in effect, obtain retrospective ratings that would have justified his promotion to A4(2) in 2005, with or without retrospective effect. He cannot. Save for his report for 2000-2001, the complainant took no steps to challenge the reports relevant to the question of his promotion to A4(2). Moreover, he lodged no internal appeal with respect to his report for 2000-2001. Having not pursued his rights to challenge those reports in accordance with the internal processes allowed by the Regulations and, if necessary, by complaint to the Tribunal, those reports are final. It is fundamental to the law governing the relations between a staff member and an international organisation that adverse decisions, including adverse performance reports, must be challenged in a timely manner and in accordance with the relevant staff rules and regulations. If not, those decisions become final and cannot be reopened. Accordingly, the complainant's performance assessments must stand. And as the various Notes relating to promotion allowed for merit to be assessed by reference to staff reports, there is no basis on which the complainant can claim promotion to A4(2).

8. There is a further matter that should be mentioned. To be eligible for promotion to A4(2), the candidate must "have demonstrated particular merit". Even if it were established that the complainant was the victim of long-term harassment and that his staff reports were neither fair nor objective, he would still need to establish that he had "demonstrated particular merit" before it could be said that he should be considered for promotion to A4(2). This is not established by the evidence.

9. The complainant has asked for an oral hearing, although he does not wish to give or call evidence. He bases his request on several grounds, including that his "cases have in common the mobbing situation at work that caused [him] serious health injuries and [the loss of his] job" and the manner in which the Tribunal has dealt

with his previous cases. He also makes extensive criticism of the legal remedies available to EPO staff members and the nature of proceedings before the Internal Appeals Committee. The complainant is entitled to express his views on these matters but he raises no issue that would justify the Tribunal departing from its consistent practice not to grant an oral hearing in cases which turn essentially on questions of law. This is such a case. Accordingly, the application for an oral hearing is rejected.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 10 November 2011, Ms Mary G. Gaudron, Vice-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 February 2012.

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