

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

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

**114th Session**

**Judgment No. 3179**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr P. d. I. F.d.A. against the European Patent Organisation (EPO) on 29 January 2010 and corrected on 19 February, the EPO's reply dated 2 June, the complainant's rejoinder of 28 June and the Organisation's surrejoinder dated 11 October 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, a Spanish national born in 1963, joined the European Patent Office, the EPO's secretariat, on 1 May 1987 as an examiner at grade A1. On 15 September 2005, while he was at grade A3, step 11, he reached the maximum limit of days of paid sick leave. He was then placed on extended sick leave until January 2006, apart from a few days of special leave in October and November 2005. Between February and July 2006 he alternated periods of extended sick leave with part-time work. He was still at grade A3, step 11, on 1 August 2006 when he separated from service owing to permanent invalidity. The statement of his invalidity pension rights of

7 August showed that they had been calculated by reference to the basic salary applicable to grade A3, step 11.

By a letter of 24 October 2006 the complainant filed an internal appeal challenging the calculation of his invalidity pension rights, in which he submitted that the wrong step had been taken into consideration when determining those rights. He considered that the Office ought to have used step 12 of grade A3, and he therefore requested a recalculation. By a letter of 29 November 2006 the complainant was informed that his request could not be granted and that the matter had been submitted to the Internal Appeals Committee for an opinion.

In the Committee's opinion of 14 September 2009 the majority of its members recommended that the appeal should be dismissed as unfounded. It considered that the complainant was one day short of the number of days which had to be effectively worked in order to be eligible for an in-grade step increment. On 7 October the complainant sent a letter to the Committee, with a copy to the President of the Office, requesting the reopening of the internal appeal proceedings on the grounds that new information had come to his knowledge regarding the calculation of the days needed for a step increment. He drew attention to the fact that, in a similar case, the Office had suggested that days of leave should be deducted from an employee's remaining leave balance to enable that person to reach the number of days needed within a step and thus advance to the next step. He considered that the Office had failed in its duty of care and had breached the principle of equal treatment by not informing him of this fact in a timely manner. He therefore presented two auxiliary requests in the context of his internal appeal, namely that one day's sick leave taken in July 2006 should be converted into one day of annual leave and that an additional day's leave should be deducted from the unused leave balance that remained when he separated from service. He added that if the Office decided not to accede to his requests, his letter was to be regarded as initiating an internal appeal.

By a letter of 11 November 2009, which constitutes the impugned decision, the complainant was informed that the President of the Office

had decided to endorse the recommendation of the majority of the Committee members and to reject the auxiliary requests which he had made in his letter of 7 October. The President also considered that he had exhausted the internal means of redress.

B. The complainant is challenging the step taken into account to determine his invalidity pension rights. He submits that by the end of June 2006 he had served in grade A3, step 11, for 24 months and that, pursuant to Article 48(d) of the Service Regulations for Permanent Employees of the European Patent Office, he should have been awarded a step increment as from July. In his view, he should thus be considered to hold grade A3, step 12, and the fact that he was again placed on extended sick leave after those 24 months had no bearing on the matter. He rejects the Office's argument that he needed to have worked one more day in order to advance to step 12 of grade A3, since he maintains that Article 48(d) contains no such requirement. He explains that the Office's mistake in determining his step is causing him considerable financial injury, because the amount of his invalidity pension is calculated by reference to annual basic salary which varies according to grade and step. He adds that the emoluments received in lieu of his unused annual leave on separation from service are also based on a wrong calculation, because the Office used the basic salary applicable to grade A3, step 11, when determining the amount due to him.

Subsidiarily, the complainant submits that during the internal appeal proceedings he learnt that the Office had allowed some employees to relinquish leave days in order to obtain the number of days needed for an in-grade step increment. He therefore proposes that he should give up one of his leave days in July 2006 which he had been granted for overtime in order to attain the 24 months plus one day which, according to the Office, were needed in order to advance to grade A3, step 12. As he still had several days of unused leave when he separated from service, the complainant also proposes that the Office should calculate the number of days which he spent at grade A3, step 11, as if he had taken one of those days of leave in July 2006.

The complainant asks the Tribunal to set aside the impugned decision and to order the Organisation to determine his invalidity pension rights and the emoluments paid in compensation for unused days of leave on the basis of grade A3, step 12. He also claims the corresponding arrears plus interest for late payment, legal expenses and costs. Subsidiarily, he asks to be authorised to use one day of annual leave which he took in July 2006, or to convert one day of sick leave into one day of compensatory leave in order to enable him to attain grade A3, step 12.

C. In its reply the Organisation contends that there is no longer any need for the Tribunal to rule on the case because the complainant obtained satisfaction after filing his complaint, since by a letter of 31 March 2010 he was notified of the decision to grant his requests concerning the determination of his step and his invalidity pension rights. According to the Office's new calculation, he reached grade A3, step 12, in June 2006. The Organisation therefore decided to pay him the arrears due in settlement of his unused annual leave and to adjust his invalidity pension. The arrears due in compensation for his annual leave were paid in March and those due in respect of the lump sum for invalidity were paid shortly thereafter, together with interest at the rate of 8 per cent per annum on all those arrears.

The EPO considers that the claim for costs must be dismissed. It emphasises that the complainant does not appear to have called on a lawyer's services when filing his internal appeal or his complaint before the Tribunal.

D. In his rejoinder the complainant acknowledges that the Organisation acceded to his requests in March 2010, but he would like the Tribunal to rule on the dispute, because the impugned decision was causing him injury at the time when he filed his complaint on 29 January 2010. He stresses that it took the Organisation three and a half years to admit that he was right and, in his opinion, this is an unreasonable period of time and an abusive exercise of a right. He explains that he is claiming costs in the amount of 2,500 euros

because, contrary to the Organisation's assertions, he did engage a lawyer who attended the hearing in the internal appeal proceedings.

E. In its surrejoinder the Organisation maintains its position. It explains that it granted the complainant's requests not because it accepted the arguments that he put forward in his internal appeal or his complaint, but because it decided that all employees in a similar situation to that of the complainant in Judgment 2756 should have their sick leave entitlement calculated by the same method. To that end it had been necessary to develop a new computer programme, and that had taken some time. It points out that the complainant did not claim costs in his internal appeal.

#### CONSIDERATIONS

1. The complainant joined the European Patent Office in 1987 as an examiner at grade A1. He had reached grade A3 when he separated from service on 1 August 2006 owing to permanent invalidity. According to a statement of 7 August 2006, the Office calculated his invalidity pension rights by reference to the basic salary applicable to the eleventh step of that grade. The complainant challenged that calculation in an internal appeal, contending that the "correct application of the method of advancement by incremental steps should give grade A3, step 12, for July 2006", and he asked to have his rights calculated by reference to the basic salary applicable to that step. In its opinion of 14 September 2009 the Internal Appeals Committee recommended by a majority that the appeal should be dismissed as unfounded. The President of the Office endorsed that recommendation and rejected the appeal by a decision of 11 November 2009. That is the decision impugned before the Tribunal.

2. On 31 March 2010, after the complainant had filed his complaint, but before the defendant submitted its reply, the Office notified him of its decision to accede to all his requests. It certified that the complainant had reached step 12 of his grade as from June 2006.

The Organisation therefore recalculated his invalidity pension rights and then paid him the arrears due to him in full, together with interest for late payment at 8 per cent per annum. In its reply it therefore asks the Tribunal to find there is no need to rule on the case.

3. In his rejoinder the complainant acknowledges that he has obtained satisfaction on account of that new decision and those payments and that his claim to have the decision of 11 November 2009 set aside has become moot. He submits, however, that the period of some three and a half years which elapsed between the date on which he challenged the calculation of his invalidity pension rights and the date on which the Office recognised its mistake and admitted that he was right is unreasonable and constitutes an abusive exercise of a right.

There is no need to resolve this issue. Neither the complaint nor the rejoinder contains any claim that the complainant should be awarded damages under this head. He merely asks that the EPO should be ordered to pay him a “lump sum of 2,500 [euros] in costs to cover all expenditure”.

4. It must be concluded from the foregoing that the complaint has become moot because the complainant has received the sums due to him. The only question which remains to be settled concerns the claim for costs.

The complainant will be awarded costs in the amount of 2,500 euros, since the Organisation’s objections, particularly the objection that the complainant is not entitled to costs because he did not claim them during the internal appeal proceedings, are misplaced. The EPO denies that it deliberately and without any reason maintained a decision that it knew to be wrong. It stresses that the recalculation of the complainant’s pension rights does not reflect acceptance of his pleas in his internal appeal and his complaint, but was carried out for different reasons. The decisive factor here is not the debtor’s legal reasoning, but the fact that the EPO has had to recognise the merits of the complainant’s claim after unjustifiably disputing it.

DECISION

For the above reasons,

1. There is no need to rule on the complainant's claim to have the decision of 11 November 2009 set aside.
2. The EPO shall pay the complainant costs in the amount of 2,500 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 6 January 2013, 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 6 February 2013.

Seydou Ba  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet