

The Administrative Tribunal,

Considering the complaints filed by Messrs T. M., J. S. and R. W. against the European Patent Organisation (EPO) on 14 January 2005, the Organisation's replies of 4 May, the complainants' single rejoinder of 10 June and the EPO's single surrejoinder of 19 September 2005;

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

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

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

A. Mr M. is a British national born in 1961 who joined the European Patent Office, the EPO's secretariat, in November 1991 at grade C3. He was promoted to grade C4 in November 1996 and to grade B3 in July 2004. Mr S., a national of the Netherlands born in 1954, joined the Office in January 1988 at grade C4 and was promoted to grade C5 in 1994 and to grade B4 in January 2005. Mr W., who was born in 1959, is also a national of the Netherlands. He joined the Office in July 1988 at grade C4 and was promoted to grade C5 in April 1997 and to grade B4 in January 2005.

As from 1 January 1991, category C posts were divided into three partially overlapping grade groups, which are also referred to as "career bands". A first band covered grades C1 to C4, a second band covered grades C3 to C5, and a third band covered C6 posts alone. Under this career system, the complainants' posts belonged to the C3-C5 career band.

On 1 January 1999 the Office introduced a new career system in which the category C career bands were reduced from three to two: a first band spanning grades C1 to C5 and a second band spanning grades C4 to C6. Staff in career band C1-C5 were now referred to as "Service Employees", whilst staff in career band C4-C6 were given the title "Technician" or "Head of Team".

For several years prior to 1999, the complainants' respective staff reports had shown their function as "Technician". When they received their staff reports for 2000-2001, they found that their function was now "Service Employee". The complainants objected to this title, particularly because they considered that it did not reflect their qualifications. They raised this issue in the appropriate section of their staff reports and requested an explanation. Their supervisors commented that it was clearly stated on the EPO's website that technicians belonged to the C4-C6 career band, and that the complainants ought to be informed in writing of the reason for their change of function. When they signed these reports in February 2003, the complainants indicated that they wanted the matter to be treated further in accordance with section D of the General Guidelines on Reporting. The Office subsequently explained to them that they were now described as "Service Employees" simply because that was the new name for staff in the C1-C5 career band, to which they belonged further to the introduction of the new career system.

Following discussions between the complainants and the Personnel Department, it was agreed that in their staff reports their function would be shown as "Service Employee (Technical Services)" and a more detailed description of their tasks would be given. However, the complainants also objected to the fact that they had been assigned to the C1-C5 career band rather than the C4-C6 band.

By a letter of 19 August 2004 they submitted a request under Article 106 of the Service Regulations for Permanent Employees to the President of the EPO. Their request was in fact two-fold. Firstly, since the Office had not yet amended their staff reports for 2000-2001 to reflect the aforementioned agreement on the designation of their

function, they requested that this amendment be made immediately. Secondly, they requested that they be assigned to category B, with retroactive effect from “the earliest allowable point in time after 1999”, on the grounds that certain colleagues with comparable qualifications who performed tasks similar to their own had been promoted long ago to category B. Subsidiarily, they requested that they be placed in career band C4-C6, likewise with retroactive effect from “the earliest allowable point in time after 1999”, on the grounds that, according to the Office’s own definition of a Technician under the new career system, they ought to have been assigned to that band automatically as from 1 January 1999. In the event that their requests were denied, the complainants asked the President to consider their letter as initiating an internal appeal.

In November 2004 the results of a job grade evaluation exercise concerning category B and category C posts were communicated to the complainants. These results confirmed the classification of their posts in the C1-C5 career band.

The complainants’ staff reports were in due course amended as agreed, but they received no response to their second request. Consequently, they lodged their complaints with the Tribunal on 14 January 2005 impugning the implied decision to reject their appeals.

B. The complainants submit that the case is not about re-grading as such, but about whether the posts they held were correctly allocated to the C1-C5 career band, which in their view affects their future career opportunities. They point out that the Office announced in its website that the C1-C5 career band comprised “non-technical and non-administrative staff of the Office such as porters, print shop and mail room staff”, whereas the C4-C6 band comprised “technical staff with completed compulsory education and a training certificate such as an apprenticeship”. They consider that as technicians they had a legitimate expectation to be classified in the C4-C6 band.

According to the complainants, during the discussions that led to the adoption of the new career system in 1999, the idea of classifying technicians and service employees in a single career band was discarded. Instead, they say, the Office’s intention was to place technicians with sufficient qualifications in a new C4-C6 career band, for which full professional training would be required in addition to educational qualifications, so as to ensure that the C4-C6 career band would not be perceived as an extension of the C1-C5 band. In support of this argument they produce a draft copy of document CA/19/98, the final version of which announced the introduction of the new career system. They assert that, contrary to the explanation given to them by the Office, document CA/19/98 does not refer to any fusion of the former C1-C4 and C3-C5 bands into a single C1-C5 band to which qualified technicians could be assigned. Consequently, they submit that the Office made an obvious mistake in classifying their posts in the C1-C5 band.

The complainants also contend that they may have had a legitimate expectation to be promoted to category B. They point out that other employees of analogous seniority, holding comparable educational qualifications and performing similar tasks, were promoted to category B when the new career system was introduced. In view of the principles of equal treatment and assignment to a grade corresponding to the functions actually performed, they consider that there is no reason why they should not enjoy a similar opportunity.

The complainants ask the Tribunal to order the EPO to assign them to category B with retroactive effect from the introduction of the new career system or, subsidiarily, from the earliest allowable point in time after 1999, and to “reimburse” the corresponding difference in salary, plus interest at 8 per cent per annum. Alternatively, they ask the Tribunal to order the Organisation to assign them to the C4-C6 career band with retroactive effect from the introduction of the new career system or, subsidiarily, from the earliest allowable point in time after 1999, and to “reimburse” any possible difference in salary, plus interest at 8 per cent per annum. In addition, they claim 2,000 euros in moral damages “for discrimination vis-à-vis other colleagues and for humiliation”, and a further award for costs.

C. In its replies the EPO submits that the complaints are irreceivable for failure to exhaust internal remedies. It points out that the complainants filed their complaints only five months after having submitted their requests under Article 106 of the Service Regulations to the President. Moreover, in February 2003 they had asked for a conciliation procedure under section D of the General Guidelines on reporting, and they were well aware that a job grade evaluation exercise was still under way at the time when they filed their complaints. The EPO considers that under these circumstances the complainants cannot seriously contend that they have exhausted the internal remedies. It argues that the complaints are also partially irreceivable because of the complainants’ promotions to

category B, which occurred between July 2004 and January 2005. According to the defendant, their claims to be assigned to that category have become “without subject”, and since the job grade evaluation exercise confirmed that their posts were correctly assigned to the C1-C5 career band, they are not entitled to the payment of any difference in salary.

Subsidiarily, the EPO contends that the complaints are unfounded. Noting that the complainants consider that their future career opportunities depend on the classification of their posts in the C4-C6 band, it points out that an employee in the C1-C5 band is not barred from reaching grade C6: he need only apply for a post in the C4-C6 band in order to reach that grade after successive promotions.

The defendant explains that in November 2003 it realised that a number of inconsistencies might have arisen since the entry into force of the new career system. Consequently, it decided to launch a job grade evaluation exercise, which was carried out in 2004 by a firm specialising in personnel matters. The results of that exercise confirmed that the complainants’ posts had been correctly assigned to the C1-C5 career band.

Lastly, the EPO submits that the complainants’ reference to other employees promoted to category B is of no avail, since promotion is granted on the basis of merit as reflected in the staff reports, and taking seniority into account.

D. In their rejoinder the complainants recall that under Article 109(2) of the Service Regulations, if the President of the Office has taken no decision within two months from the date on which an internal appeal was lodged, the appeal shall be deemed to have been rejected. They add that their promotions to category B do not render their complaints irreceivable, but merely have the effect of limiting their claims in that respect to the date of their respective promotions.

They argue that the results of the job grade evaluation exercise were inconclusive with regard to the question of whether their posts were correctly classified in the C1-C5 band and that, in any case, the EPO ought to have followed the classification criteria it had unambiguously announced in its website.

E. In its surrejoinder the defendant submits that the complainants’ rejoinder introduces no argument liable to modify its position, which it maintains.

## CONSIDERATIONS

1. The complainants are employees of the European Patent Office who, prior to 1999, held category C posts in the C3-C5 career band with the following job titles and grades, respectively: Fitter (air conditioning), grade C4; Technician (light current engineering) II, grade C5; and Fitter (air conditioning) II, grade C5. At that stage, there were three relevant career bands: C1-C4, C3-C5 and C6. From 1 January 1999, those career bands were abolished and replaced with two new bands: C1-C5 and C4-C6.

2. In the job descriptions provided in the EPO Service Regulations, an employee in the new C1-C5 band is described as a “Service Employee” and the minimum qualification is specified as “[c]ompleted compulsory education”. The level of duties is described at C1 as “simple duties in a limited field”, with the range and difficulty of the work increasing at subsequent grades until C5, where an employee “works largely on his own responsibility” and may supervise other staff. The Service Regulations stipulate that at C5, the employee must have experience enabling the performance of work in a broad field and “marked technical/organisational skill”.

3. An employee in the new C4-C6 band is described in the Service Regulations as a “Technician / head of team”, and the minimum qualification includes the completion of an apprenticeship and eight years’ professional experience. The level of duties at C4 is specified as working “in a specialised field and/or as head of a team of technicians”. It increases in range and difficulty in C5 and, in C6, the employee works in “an extensive or highly specialised field” and, if a head of team, manages service employees and organises their work.

4. The complainants were listed in their 2000-2001 staff reports as Service Employees notwithstanding that they had been described in earlier reports as Technicians. They objected to being designated as Service Employees and their objections were endorsed by their supervisors. However, they were told that, as they were in the C1-C5 band, they were properly so described.

5. By letter of 19 August 2004 the complainants’ representative submitted a formal request to the EPO

President, asking that the complainants be described in their staff reports as “Service Employee[s] (Technical Services)” and that they be classified in category B or, in the alternative, that they be classified in the C4-C6 band with effect from 1 January 1999. The President was informed that, if and to the extent that the requests were not granted, the complainants wished that letter to be treated as the lodging of an internal appeal under Article 108 of the Service Regulations.

6. It was agreed that the complainants would be described as “Service Employee[s] (Technical Services)” in their staff reports but they received no response to their other requests. Moreover, the President did not register their appeals with respect to those matters within the two-month period specified in Article 109(2) of the Service Regulations. As their appeals were deemed rejected under the terms of that article, they lodged their complaints on 14 January 2005.

7. The EPO contends that, as the complainants have not exhausted internal remedies, the complaints are not receivable. However, the complainants are in the same position as the complainant considered in Judgment 2223. In that case, it was said that since the Director-General had not initiated the appeal procedure as required by the relevant rules, that invalidated the argument that internal remedies had not been exhausted and, thus, the Tribunal was not prevented from dealing with the complaint. However, the EPO argues that the position is different in this case because of the steps taken to have the complainants’ gradings correctly determined. In effect, the Organisation asserts that the complainants have waived their right to pursue an appeal or, ultimately, to lodge complaints with the Tribunal.

8. For its argument concerning receivability, the EPO relies on the fact that in 2003 the complainants requested a conciliation procedure with respect to the staff reports which described them as Service Employees. When informed that that procedure was not applicable, the complainants, according to the EPO, agreed to “leave the reports pending until the end of the B and C Job Grade Evaluation [exercise]”. That argument must be rejected. If there was any waiver, it was limited to the complainants’ right to pursue an appeal with respect to their staff reports and their description in those reports as Service Employees. The agreement on which the Organisation relies did not relate to their claims to be classified in either the C4-C6 band or the B category and thus could not prevent them from lodging appeals and, ultimately, filing their complaints relating to those claims.

9. So far as the complainants are concerned, the job grade evaluation exercise was apparently completed in November 2004 when they were informed that they were correctly graded in the C1-C5 career band. However, in February 2005, after they had lodged their complaints, they were informed, along with other staff, that they could request a review of their grading, and each complainant did so. In the case of one complainant, that review had not been completed when the EPO filed its reply in May 2005; in the case of the other two, it resulted in the re-grading of their posts and promotion to B4 with effect from 1 January 2005. There is, thus, a question whether, by their requests for review, the complainants impliedly agreed not to proceed with their complaints before the Tribunal.

10. In Judgment 2039 the Tribunal noted that, where a complainant has proceeded directly to the Tribunal, a question may arise as to whether he or she has abandoned an internal appeal or impliedly consented to its suspension. In principle, there is no reason why the same question should not arise in relation to a complaint lodged with the Tribunal. However, as with internal appeals, the question will only arise if the complainant has not pursued the matter diligently. The complaints have been pursued with diligence and there is nothing to indicate that the complainants intended or impliedly agreed that their complaints should be either suspended or abandoned because their gradings were to be reviewed.

11. The EPO also argues that one complaint is without subject and, thus, irreceivable because the complainant in question was promoted to category B on 1 July 2004 following his application for a vacant post. That argument must also be rejected. The effect of his promotion is simply to limit his claim to that date.

12. As the Organisation’s arguments with respect to receivability must be rejected, it is necessary to consider the complainants’ claim to be classified either within the C4-C6 career band or within the B category. The only material relied upon to justify classification within the B category from 1 January 1999 is that three other employees with like qualifications and tasks were then promoted to that category. Presumably, the complainants contend that they were not treated equally. However, in the absence of evidence that the other three employees were correctly classified and that there was no relevant difference between them and the complainants, the argument must be rejected.

13. So far as concerns the claim to be placed within the C4-C6 career band, it is appropriate to observe that the Tribunal has consistently held that it is for the competent body and, in the last resort, the executive head of the relevant organisation to grade staff members following an exercise involving the making of value judgements as to the nature and extent of the duties and responsibilities of the post. Accordingly, the Tribunal will only substitute its own assessment or direct a new assessment if it is shown, for example, that the competent body acted on some wrong principle or overlooked some material fact or reached a clearly wrong conclusion (see Judgments 594, 1067, 1152, 1281 and 1495). However, the present case does not involve grading, as such, but the allocation of established grades to the correct career band.

14. It is clear from the complainants' staff reports for the years prior to 1999 that they held qualifications and performed duties of a kind that might appropriately result in their assignment to the C4-C6 career band. However, that is not decisive: the job descriptions in the Staff Regulations relevant to the C1-C5 and the C4-C6 bands are expressed with such generality that it is possible that the complainants might also have been appropriately assigned to the C1-C5 band. What is decisive is that the EPO explained the difference between the two career bands on its website in these terms:

“C1-C5 are known as ‘Employee’ and comprise the non-technical and non-administrative staff of the Office such as porters, print shop and mail room staff.

C4-C6 are technical staff with completed compulsory education and a training certificate such as an apprenticeship.”

15. When regard is had to the complainants' staff reports, it is clear that they could not have been described in 1999 or at any time thereafter as “non-technical and non-administrative staff”. They were technical staff. As such, they should have been placed in the C4-C6 career band. The decision that they were correctly placed in the C1-C5 band could only be reached by overlooking the distinction which the EPO itself drew between the two career bands. That was to overlook a material fact and resulted in the drawing of a clearly wrong conclusion. Accordingly, each of the complainants is entitled to be placed within the C4-C6 career band from 1 January 1999 until his subsequent promotion to the B category. Each complainant is entitled to be paid the salary difference, if any, resulting from his placement in the C4-C6 band.

16. The placing of the complainants in the C1-C5 career band was a slight to their technical qualifications and the technical nature of their work. They are each entitled to moral damages in the sum of 500 euros. And although they have been represented by an EPO staff member in accordance with the Service Regulations, they are each entitled to 250 euros by way of costs to compensate for the time and expense they necessarily incurred in pursuit of their complaints.

## DECISION

For the above reasons,

1. The implied decision rejecting the complainants' appeals of 19 August 2004 with respect to their being placed in the C4-C6 career band is set aside.
2. The EPO shall place each of the complainants in the C4-C6 career band with effect from 1 January 1999 until the date on which he was promoted to the B category.
3. It shall pay each of the complainants the salary difference, if any, resulting from his placement within the C4-C6 career band together with interest at the rate of 8 per cent per annum from the relevant dates.
4. The EPO shall also pay each complainant moral damages in the sum of 500 euros and costs in the sum of 250 euros.
5. The complaints are otherwise dismissed.

In witness of this judgment, adopted on 28 October 2005, Mr Michel Gentot, President of the Tribunal, Mr James

K. Hugessen, Vice-President, and Ms Mary G. Gaudron, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 1 February 2006.

Michel Gentot

James K. Hugessen

Mary G. Gaudron

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 15 February 2006.