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

111th Session **Judgment No. 3043**

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr J. D.-S. against the European Patent Organisation (EPO) on 12 December 2008 and corrected on 21 January 2009, the Organisation's reply of 4 May, the complainant's rejoinder of 24 July and the EPO's surrejoinder of 29 October 2009;

Considering Articles II, paragraph 5, and VI 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 dispute are to be found in Judgments 1559, 1832, 1891, 2040, 2299, 2412, 2579, 2668 and 2832 delivered in the previous cases brought by the complainant.

The complainant, who joined the European Patent Office – the EPO's secretariat – in 1980, retired on 1 March 2007. His retirement

pension is calculated on the basis of grade A4(2), step 11. Between 1991 and his retirement he applied on several occasions for grade A5 posts as a technically qualified member of a board of appeal, but his applications were always unsuccessful. His lack of success lies at the root of most of the nine above-mentioned judgments. In January and March 2005 the complainant submitted applications for several vacant posts for members of boards of appeal. He was advised by a letter of 24 May that the selection procedure for the posts for which he had applied in March had been discontinued. He was then informed by letters of 15 and 24 June 2005 that his applications for the other posts had been unsuccessful.

On 17 August 2005 the complainant lodged an appeal against the decisions of 24 May, 15 June and 24 June with both the Chairman of the Administrative Council and the President of the Office. He requested the quashing of these three decisions, inter alia. The appeal to the Chairman of the Administrative Council culminated, after the exhaustion of internal means of redress, in the Tribunal's dismissal of the complainant's eighth complaint (see Judgment 2668). As for the second appeal, a letter of 15 September 2008 informed him that the President of the Office had dismissed it in accordance with the recommendation of the Internal Appeals Committee. That is the impugned decision.

B. The complainant contends that his complaint is receivable. He states that, although he is retired, on 22 April 2008 the EPO recognised that he had a cause of action in one of his two internal appeals challenging the appointment of a grade A3 administrator to a grade A5 director's post, and he submits that *mutatis mutandis* it must be accepted that he has cause of action in the present complaint. He is surprised that his applications for posts for members of boards of appeal should have been "consistently rejected" although he had "long" held the requisite qualifications for that kind of post. He considers that he has been the victim of discrimination, which "ruined part of his career, harmed his family and whose effects are still being felt" today.

He further submits that the appointment of any permanent employee must rest on Articles 4 and 49 of the Service Regulations for Permanent Employees of the European Patent Office, concerning vacant posts and access to a higher grade respectively. He dwells on the importance of the criteria relating to merit and seniority listed in Article 49(7). In his opinion, appointment procedures are handled differently depending on whether the appointing authority is the Administrative Council or the President of the Office. He points out that an appointment by the President of the Office of a grade A3 permanent employee to an A5 director's post was cancelled by the Tribunal in Judgment 1968; he therefore considers that similar appointments made by the Chairman of the Administrative Council are tainted with misuse of authority and must be cancelled.

The complainant holds that the Organisation was wrong to base the direct appointment of A3 permanent employees to grade A5 posts on Article 49(1)(b) and on the third subparagraph of Article 4(1) of the Service Regulations, since this provision defines a procedure which is reserved for employees. He contends that confusion between the terms "permanent employee" and "employee" led the Organisation to make unlawful appointments.

The complainant requests the joinder of this complaint with his previous complaint filed on 18 January 2008, a stay of proceedings until a decision on two pending internal appeals has been taken and a review of most of the judgments concerning him. He also requests the award, "on a personal basis and by way of redress", of a retirement pension calculated on the basis of the 13th and last step of grade A5. He claims damages in the amount of 1,000 euros and 2,000 euros in costs.

C. In its reply the EPO submits that the complaint is manifestly irreceivable. It also points out that the complainant's previous complaint was entered on the list of the Tribunal's 107th session, which renders the request for joinder redundant. It informs the Tribunal that the complainant was advised by a letter of 30 March

2009 that his two internal appeals had been rejected. It is therefore of the opinion that there is no longer any justification for a stay of proceedings. It states, with respect to the request for review, that it is incumbent upon the complainant to demonstrate the existence of exceptional circumstances. It further contends that Judgment 2668, concerning the complainant's eighth complaint, has acquired *res judicata* authority and that, as the Tribunal's decision explicitly encompassed the internal appeal giving rise to the present complaint, the complainant's financial claims are irreceivable. It explains that in May 2008 it altered its position on the question of his cause of action.

The Organisation maintains that members of boards of appeal hold a special position within the Office on account of their responsibilities. Appointment to such a post is governed by special rules and the procedure is different to that laid down for an ordinary promotion in Article 49(1)(d) of the Service Regulations. It observes that, as the Tribunal accepted in Judgment 2040 concerning the complainant's fourth complaint, the appointment of a grade A5 member of a board of appeal is based on Article 7(1) of the Service Regulations and Article 11(3) of the European Patent Convention. There is therefore no reason to abide by criteria such as seniority in a grade. It emphasises that an appointment is handled in the same manner regardless of whether the appointing authority is the Administrative Council or the President of the Office. The fact that two appointment procedures have been established does not constitute a breach of the principle of equal treatment, because different rules govern situations that are dissimilar in both fact and law. Moreover, the reference to Judgment 1968 is irrelevant, because that particular case related to an appointment under Article 49 of the Service Regulations.

The Organisation explains that the term "employee" refers to all internal candidates who may be "permanent employees or contract staff".

With reference to the complainant's claim to the "*ad personam*" award of a pension calculated on the basis of the last step of grade A5, the EPO draws attention to the Tribunal's reasoning in Judgment 2668,

in which it could not find that "the conditions for the exceptional awarding of a personal promotion were met".

The Organisation considers that the internal appeals lodged by the complainant following his retirement are vexatious, and it endeavours to show that they have caused a considerable waste of time and money. It submits a counterclaim for damages in an amount to be determined by the Tribunal.

D. In his rejoinder the complainant maintains that his complaint is receivable. He argues that the appointment of two grade A3 permanent employees to grade A5 director posts constitutes "a new fact" warranting a review of most of the judgments concerning him.

He emphasises that he is requesting the recalculation of his retirement pension "on a personal basis and by way of redress" and not "*ad personam*" as the Organisation asserts, which in his view renders the *res judicata* principle inapplicable to the instant case.

The complainant is of the opinion that the lawfulness of appointing a grade A3 permanent employee to a grade A5 post, without having regard to criteria such as seniority and merit, is "dubious".

He does not consider that he has abused his right to appeal to the Tribunal in view of "the grave injustice" caused by appointments which he regards as unlawful and injurious.

E. In its surrejoinder the Organisation regrets that the complainant did not withdraw his complaint once he had taken cognisance of the considerations of Judgment 2832 concerning his ninth complaint.

The Organisation fails to understand the distinction drawn by the complainant between "*ad personam*" redress and redress "on a personal basis" and it submits that the Tribunal has no jurisdiction to order "the granting of a particular grade to serve as the basis for calculating a pension".

The EPO suggests that the time has come to penalise the complainant for his conduct and it maintains its counterclaim.

CONSIDERATIONS

1. The complainant, who was born in 1942, joined the European Patent Office on 1 July 1980 as an examiner at grade A3. He was promoted to grade A4 on 1 May 1989 and to grade A4(2) with effect from 1 November 2001.

As from 1991 he applied on several occasions, without success, for grade A5 posts as a technically qualified member of a board of appeal. These failed attempts to secure appointment to such a post and to the corresponding grade have already given rise to several Tribunal judgments on previous complaints filed by the complainant.

2. The complainant retired on 1 March 2007. In accordance with his professional status at the end of his career, he has since received a retirement pension calculated on the basis of grade A4(2), step 11.

3. The present complaint arises from the rejection of the applications which the complainant submitted in January 2005 in response to vacancy notices for posts for members of boards of appeal, and from the Office's decision to discontinue the selection procedure opened in March 2005 in order to fill other posts of the same kind.

4. On 17 August 2005 the complainant lodged an internal appeal against these various decisions with both the Chairman of the Administrative Council and the President of the Office. He requested the quashing of these decisions and also asked that "[by] way of redress […] the appointing authority should award [him] the last step (13th step) of grade A5 *ad personam*", as had been done in the case of a colleague some 20 years earlier.

5. As a result of the distribution of the power to make appointments within the Organisation, which is determined by Articles 10 and 11 of the European Patent Convention, an internal

appeal of this nature lay partly within the competence of the Administrative Council and partly within that of the President of the Office. Indeed, Article 10(2)(g) of the Convention stipulates that, subject to Article 11 on the appointment of senior employees, it is for the President of the Office to appoint the employees and decide on their promotion. Article 11(3) makes it clear, however, that the members of the boards of appeal are to be appointed by the Administrative Council and that the President of the Office may only make proposals in this respect.

As a result of this division of competence, while the Administrative Council alone was competent to examine the complainant's claims relating to the procedures for appointing members of boards of appeal, it was for the President of the Office, as the authority with the power to promote employees, to decide on the complainant's request for *ad personam* promotion.

It was precisely in order to take into account this division of responsibilities that the complainant took the trouble of lodging his internal appeal simultaneously with the Chairman of the Administrative Council and the President of the Office.

6. By a decision of 5 July 2006 the Administrative Council, acting on a unanimous recommendation from its Appeals Committee, rejected the appeal which had been filed with it. The Council rightly held, with regard to the request for promotion on a personal basis, that it had "no power to appoint someone on its own initiative to an *ad personam* grade".

7. In Judgment 2668, delivered on 6 February 2008, the Tribunal dismissed the complaint filed by the complainant against this Administrative Council decision. Noting that the President of the Office had not by then taken any decision on the aspect of above-mentioned internal appeal which lay within his sphere of competence, the Tribunal considered that the complaint should be regarded as being also directed against that implied rejection, on the strength of

Article VII(3) of its Statute. It then examined the complainant's request for *ad personam* promotion, which, in the same judgment, it dismissed as unfounded.

8. However, by a subsequent decision of 15 September 2008 the President of the Office, following a unanimous recommendation from the Internal Appeals Committee, expressly dismissed the above-mentioned appeal.

It is this last decision which the complainant now impugns before the Tribunal.

The complainant seeks not only the quashing of this decision, but also the review of seven judgments in which the Tribunal dismissed previous complaints filed by him, namely Judgments 1559, 1891, 2040, 2299, 2412, 2579 and 2668. He further requests the award of a retirement pension calculated on the basis of the last step of grade A5, as well as damages in the amount of 1,000 euros and costs amounting to 2,000 euros.

9. The complainant has requested an oral hearing. As the written pleadings and documents produced by the parties are sufficiently detailed, the Tribunal considers that it is fully informed about the case and does not deem it necessary to grant this request.

10. The complainant has also asked that this complaint be joined with his previous complaint filed on 18 January 2008, in which he challenged the appointments of board of appeal members in 2007. But the Tribunal has already ruled on the previous complaint in Judgment 2832, delivered on 8 July 2009. This request for joinder has thus become moot.

11. With regard to the claims seeking a review of the seven aforementioned judgments, it must be pointed out that consistent precedent has it that, pursuant to Article VI of the Statute of the Tribunal, the latter's judgments are "final and without appeal" and carry the authority of *res judicata*. They may therefore be reviewed only in exceptional circumstances and on strictly limited grounds. As

stated in Judgments 1178, 1507, 2059 and 2736, the only admissible grounds for review are failure to take account of material facts, a material error involving no exercise of judgement, an omission to rule on a claim, or the discovery of new facts on which the complainant was unable to rely in the original proceedings. Moreover these pleas must be likely to have a bearing on the outcome of the case.

12. In the instant case, the sole plea put forward by the complainant in support of his request for review rests on the existence of a "new fact". According to the complainant this new fact is that, for the first time in 2006, grade A3 permanent employees were appointed to grade A5 to fill director posts, whereas the direct appointments to this grade referred to in the aforementioned judgments concerned employees who were invited to take up posts as members of boards of appeal.

However, pursuant to the above-mentioned case law, a new fact will constitute an admissible ground for review only if it is a material fact, consideration of which would have been likely to have a bearing on the judgment rendered (see, for example, Judgments 748, under 3, 2270, under 2, or 2693, under 2).

The appointment of grade A3 permanent employees to director posts in 2006 was plainly unlikely to have any bearing on the outcome of the complaints filed with the Tribunal. Indeed, the assessment of the lawfulness of the decisions impugned in the disputes in question, which concerned the procedure for appointing members of boards of appeal, could not have been affected by consideration of this fact, which moreover arose after most of the said decisions had been taken.

13. The request for review of the seven aforementioned judgments will therefore be dismissed, without there being any need for the Tribunal to examine whether such a request is admissible in the context of a complaint that has not been filed for that specific purpose.

14. With regard to the claims directed against the decision of the President of the Office of 15 September 2008, it must first be noted that the fact that the complainant retired in 2007 has no bearing on

their receivability. Although in Judgment 2832 the Tribunal found that the complainant had no cause of action in challenging appointments which had been made after his retirement, the present dispute concerns events that occurred in 2005, i.e. before he left the EPO.

15. It is, however, essential to clarify the scope of the impugned decision. As stated above, it was the Administrative Council, and not the President, that was competent to examine the complainant's claims concerning the procedures for selecting members of boards of appeal. Insofar as it concerned these issues, the complainant's internal appeal had already been rejected by the Council's decision of 5 July 2006, the lawfulness of which was confirmed by Judgment 2668. Thus, the decision of the President of the Office of 15 September 2008 must be construed as a dismissal of this internal appeal only to the extent that it lay within her competence, that is to say insofar as it sought to obtain an *ad personam* promotion.

16. From this it follows that the arguments put forward by the complainant in the instant case, in order to challenge the outcome of the selection procedures which took place in 2005 and the discontinuance of one of them, must be dismissed as irrelevant.

17. With regard to the request for *ad personam* promotion, the explicit rejection of which thus constitutes the only new element introduced by the decision of 15 September 2008, the EPO objects that this request is barred by *res judicata* because, as stated earlier, the Tribunal ruled on the lawfulness of an implied rejection of this request in Judgment 2668. In view of the reasoning set out below, the Tribunal does not deem it necessary to decide on the merits of this objection.

18. It must be recalled that *ad personam* promotion constitutes advancement on merit to reward an employee for services of a quality

higher than that ordinarily expected of the holder of the post. In the absence of any provision to the contrary, it is an optional and exceptional discretionary measure which is subject to only limited review by the Tribunal (see Judgments 1500, under 4, and 1973, under 5). This kind of promotion should certainly not be granted as redress for an alleged injury, as the complainant requests. The advancement of an official naturally obeys its own logic related to the classification of the job done and the professional merit of the person in question, which has nothing to do with the logic behind compensation for injuries which may have been caused to this person by the international organisation employing him or her (see Judgment 2706, under 8).

19. As the Tribunal already found in Judgment 2668, the complainant does not show that he performed duties of a higher level than those required of patent examiners at his grade. Nor does he cite any provision which would have entitled him to such a promotion for the reasons he puts forward, and the precedent on which he relied in his internal appeal concerned a permanent employee promoted in circumstances very different from those of the instant case. Since no new fact has come to light in the submissions in the current proceedings, the Tribunal can only find, once again, that the prerequisites for such an exceptional promotion of the complainant are not met. His contention that he is no longer requesting an *ad personam* promotion as redress but promotion "on a personal basis and by way of redress" is obviously devoid of merit.

20. Since the impugned decision is not unlawful in any way, the complainant's claims for compensation to redress the injury which it allegedly caused him will be dismissed.

21. Lastly, with regard to the complainant's request that this judgment award him a retirement pension calculated on a different basis, the Tribunal recalls that it has no jurisdiction in any event to award him such redress (see Judgment 2832, under 10).

22. It follows from the foregoing that the complaint must be dismissed in its entirety without there being any need for the Tribunal to grant the complainant's request for a stay of proceedings.

23. The Organisation, which considers that the complaint is vexatious, asks that the complainant be ordered to pay it damages.

Without ruling out, as a matter of principle, the possibility of making such an order against a complainant or, at least, of requiring a complainant to pay costs (see, for example, Judgments 1884, 1962 and 2211), the Tribunal will avail itself of that possibility only in exceptional situations. Indeed, it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards of that kind.

24. In the present case the complaint, which must obviously be dismissed, might well be perceived as an abuse of procedure, especially as the complainant had already been apprised of the above-mentioned Judgment 2668 when he filed it. However, as the Tribunal already stated in Judgment 2832, it is to be hoped that the complainant's retirement will prevent him from raising new disputes in the future. Contrary to the Organisation's submissions, the complainant's attitude during these proceedings does not belie this hope, given that the initial decisions challenged in this case predated his retirement by two years and the slowness of the internal appeal procedure is the only reason why the case was not brought to the Tribunal earlier. In these circumstances, while it must be emphasised that the filing of a vexatious complaint may lead to an award against its author, the Tribunal therefore sees no need, in this case, to allow the Organisation's counterclaim.

DECISION

For the above reasons,

The complaint is dismissed, as is the EPO's counterclaim.

In witness of this judgment, adopted on 6 May 2011, Mr Seydou Ba, Vice-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 July 2011.

Seydou Ba
Claude Rouiller
Patrick Frydman
Catherine Comtet