

116th Session

Judgment No. 3283

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr I. A. R. against the European Patent Organisation (EPO) on 15 April 2010, the EPO's reply dated 26 July, the complainant's rejoinder of 26 September, and the letter of 13 December 2010 by which the Organisation informed the Registrar that it did not wish to submit a surrejoinder;

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

Having examined the written submissions and decided not to hold oral proceedings, 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 joined the European Patent Office, the EPO's secretariat, as a grade B4 administrative employee on 1 November 1977. He was promoted to grade B5 in April 1979 and to grade B6 in January 1992. Following a selection procedure, he was appointed to the post of administrator at grade A2 with effect from 1 April 2004. In April 2005 he lodged an internal appeal contesting his new grade

and requesting to be classified at grade A4 in light of his extensive experience in category B. His internal appeal was rejected as unfounded, in accordance with the unanimous opinion of the Internal Appeals Committee (IAC). This decision was not contested before the Tribunal.

Article 49 of the Service Regulations for Permanent Employees of the European Patent Office deals with promotion. At the material time, paragraph 7 of that Article provided as follows:

“Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and at least two years’ service in their grade in the Office [...]”

Guidelines for applying Article 49(7) of the Service Regulations are to be found in Circular No. 271 of 12 June 2002, concerning the implementation of the career system for category A employees. It indicates, under Section III.A, that promotion within grade group A4/A1 occurs on a recommendation by the promotion board and is based on merit and experience. Promotion to A3 or A4 occurs at the earliest after two years in the grade occupied prior to promotion. The number of years’ experience required varies according to the grade in question and the staff member’s merit. Section III.C of the Circular deals specifically with category B and C staff promoted to category A.

On 19 October 2006 the list of staff members promoted during 2006 was published. The complainant’s name did not appear on this list. By a letter of 17 January 2007 he requested that he be promoted to grade A3 with effect from 1 April 2006. He argued that his previous experience in category B, which had been recognised when he was appointed to the post of administrator at grade A2 in April 2004, ought to be taken into account for the purposes of a promotion to A3, so as to ensure equal treatment in relation to colleagues recruited directly at grade A2. In his view, the application of Circular No. 271 was “arbitrary and discriminatory”. In the event that his request could

not be met, the complainant asked that his letter be considered as an internal appeal.

By a letter of 5 March 2007 the Director of the Employment Law Directorate informed the complainant that after an initial examination of his case, the President of the EPO considered that the provisions of Circular No. 271 had been correctly applied and there had been no breach of the principle of equal treatment, as the complainant was not in the same factual and legal situation as staff members directly recruited in category A. The complainant's case had been referred, therefore, to the IAC for an opinion.

The complainant was promoted to grade A3 with effect from 1 April 2008.

In its opinion of 26 November 2009, the IAC unanimously recommended that the appeal be dismissed as unfounded. Recalling that the decision on whether or not to grant a promotion is discretionary in nature and subject only to limited review, the IAC concluded that the applicable rules had been observed and that the complainant was not eligible for promotion to A3 in April 2006, as he possessed only two years of experience at grade A2. Further, the IAC found that the applicable rules did not constitute a breach of the principle of equal treatment, since the complainant was not in the same factual and legal situation as other staff members directly recruited at grade A2.

By a letter of 19 January 2010 the Director of Regulations and Change Management informed the complainant that the President had decided to follow the IAC's opinion and to reject his internal appeal as unfounded in its entirety. That is the impugned decision.

B. The complainant contends that, when he was appointed to grade A2 in April 2004, the EPO necessarily recognised that he had "at least five years' A grade experience" because, according to Article 49(9)(b) of the Service Regulations, a staff member promoted by appointment to a post in another category must have "the minimum number of years of professional experience required under the job

description in order to obtain the grade for the post concerned". By April 2006, having served at grade A2 for two years, he thus had seven years' total experience, and since the ratings in his staff reports had always been either very good or excellent, he satisfied the requirements for promotion to A3 as set out in Circular No. 271.

In the complainant's view, the stricter provisions of Circular No. 271, Section III.C, according to which his prior experience in category B cannot be taken into account for the purpose of future promotions within category A, cannot take precedence over Article 49(9) of the Service Regulations, which is a higher-ranking norm. He points out that although he raised this argument before the IAC, the latter did not comment on it in its report.

Lastly, the complainant submits that Section III.C of Circular No. 271 results in unlawful discrimination between staff appointed directly to grade A2 and those promoted to that grade from grade B6. He explains that the former must have at least five years' recognised experience in order to be appointed at grade A2, but, unlike their colleagues promoted from grade B6, who by definition must have the equivalent recognised experience, they can avail themselves of that experience for the purpose of future promotions within the Organisation. This, he argues, constitutes unequal treatment. In this regard, he draws attention to the fact that both Article 49 and Circular No. 271 were amended in October 2007, after which the Principal Director of Personnel issued an instruction stating that "[t]he amendments will ensure equal treatment of internal and external candidates who participate in general competition procedures".

The complainant asks the Tribunal to set aside the impugned decision, to promote him to grade A3 with effect from 1 April 2006, and to order that the equivalent experience qualifying him for appointment to grade A2 be recognised for all future promotions. He seeks moral damages in an amount of no less than 10,000 euros, as well as costs in the amount of 1,000 euros.

C. In its reply the EPO submits that the complaint is unfounded. It recalls that promotion is neither something to which staff are entitled,

nor is it automatic. The Organisation contests the complainant's assertion that he brought arguments during the internal appeal procedure which were not addressed by the IAC. It points out that the complainant had already claimed, in his previous internal appeal, that Circular No. 271 was in breach of Article 49 of the Service Regulations. Contrary to his allegations, Section III.C of Circular No. 271 is not stricter than Article 49(9) of the Service Regulations, rather, the contrary is true, since Section III.C does not provide for a minimum number of years of service in grade or category. Moreover, Article 49(9) does not provide that he must have at least five years' experience for appointment at grade A2. Therefore, the complainant's argument in this regard is unfounded.

The EPO explains that in 2007 it decided to clarify the statutory provisions relating to appointments and promotions. The Administrative Council thus decided to amend Article 49 of the Service Regulations in order to ensure equal treatment in the assessment of internal and external applicants during a selection procedure. However, the Organisation argues, a distinction has to be made between the selection procedure and grade and step assignment for a selected applicant, since the latter is governed by different provisions depending on whether he or she is an external or internal applicant. Moreover, even among internal candidates, the provisions relating to step and grade differ between category B and category A. Consequently, since the factual and legal situation of a selected external candidate differs from that of a selected internal candidate, the complainant's argument that the decision breaches the principle of equal treatment is unfounded. The IAC also confirmed such conclusion.

D. In his rejoinder the complainant presses his pleas. He points out that Section II.A of Circular No. 271 requires a minimum of five years' experience for direct entry of external applicants to grade A2. He maintains that Section III of the Circular is arbitrary and discriminatory.

CONSIDERATIONS

1. It is noted that the complainant joined the EPO as a grade B4 administrative employee in November 1977. He was promoted to grade B6 in January 1992, and then to grade A2 on 1 April 2004. He challenged the Organisation's decision not to promote him to grade A3 after his name did not appear on the list of employees who were promoted to that grade with effect from 1 April 2006. He lodged an internal appeal with the Organisation in January 2007. This and his previous internal appeal, were unsuccessful. He filed this complaint before the Tribunal after the President of the EPO, expressly concurring with the opinion of the Internal Appeals Committee, rejected his latest internal appeal on 19 January 2010. This is the impugned decision. His complaint was filed with the Tribunal on 15 April 2010 and is therefore receivable under Article VII of the Tribunal's Statute.

2. It is noteworthy, at the very outset, that the parties agree, on the basis of the consistent case law of the Tribunal, that promotion in an organisation is neither an entitlement nor is it automatic. It lies within the discretion of the person or authority within whose purview promotion or appointments fall within an organisation. This is the Promotion Board, which is established under Article 49(5) of the Service Regulations of the EPO. This is a joint body that is comprised of a Chairman, two members appointed by the President of the EPO and two members who are appointed by the Staff Committee.

3. Consistent precedent of the Tribunal states that the discretion to promote an employee is only subject to limited review by the Tribunal. The Tribunal will only strike down a decision on promotion if the decision is *ultra vires*; if it is tainted with a legal or procedural irregularity; if it overlooks a material fact; draws a wrong conclusion from the evidence; is based on an error of fact or law or amounts to an abuse of authority. (See, for example, Judgment 1137, under 2, and Judgment 1463, under 3).

4. The complainant seeks to impeach the failure of the Organisation to promote him to grade A3 with effect from 1 April 2006 on the ground that there was an error of fact or law on the part of the promoting authority.

5. The fact that the complainant was eventually promoted to grade A3 with effect from 1 April 2008 has no bearing on the present case. His insistence is that he should have been promoted two years prior to that date. Accordingly, his prayer to the Tribunal is to set aside the President's decision of 19 January 2010 which rejected his appeal. Further, that the Tribunal should promote him to grade A3 with effect from 1 April 2006; order that the equivalent experience, which he insists qualified him for appointment to grade A2 be recognised for all future promotions, and award him moral damages and costs.

6. The complainant's case has consistently been that he expected that he would have been promoted to grade A3 with effect from 1 April 2006. This, he asserts, was because he thinks that he fulfilled the conditions for that promotion in accordance with Article 49(9)(b) of the EPO Service Regulations and the guidance provided by Sections II.A and III.A of Circular No. 271 of 12 June 2002.

7. Circular No. 271 addresses the implementation of the career system for category A. Sections II and III are, respectively, the provisions that relate to grade and step on recruitment and the implementing rules to Article 49 of the Service Regulations that provide the guidelines for promotion.

8. Article 49(9) of the Service Regulations states as follows:
"Promotion by appointment to a post in another category shall be by selection from among permanent employees who have applied and who have the necessary qualifications, after consideration of their ability and of reports on them. The applicants must:

- (a) have at least the minimum number of years of service in their grade or category laid down in the Implementing Rules;
- (b) have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned;
- (c) have had the sufficiency of their professional abilities assessed in accordance with a procedure laid down by the President of the Office.”

9. Paragraph A, Section II, of Circular No. 271 entitled “Grade and step on recruitment” refers to the minimum reckonable previous experience that is assumed credited to a person who is recruited to a particular post in category A grades. Insofar as it is necessary for this case, a person who is recruited to grade A2 is credited with or assumed to have the minimum reckonable previous experience. It is this that the complainant insists that should have been taken into account, with the additional two years that he spent in grade A2, to give him seven years’ experience and the requirement which dictated his promotion to grade A3 with effect from 1 April 2006.

10. Section III of Circular No. 271 deals with promotion within grades A1 to A4. Insofar as it is relevant to this matter, it states as follows:

“Promotion within grade group A4/A1 occurs on a recommendation by the promotion board, and is based on merit and experience.

Merit

To assess merit, promotion boards draw on a staff member’s performance-appraisal reports. Important aspects of merit are his aptitude and abilities and his efforts to develop these in order to meet the needs of the service and fulfil the requirements of the next higher grade.

Experience

The table below shows the number of years’ experience required, depending on merit, for advancement within grade group A4/A1. The ‘number of years’ experience’ criterion is met by whichever of the following two conditions – taken separately and without reference to the other – is fulfilled first:

- (a) total experience as defined above
- (b) seniority in the grade occupied prior to promotion.”

11. The table which follows sets out the number of years' experience required for "access" or possible promotion to grades A2, A3 and A4, for employees variously pursuing average careers and rapid careers. It is common ground that the complainant is pursuing a rapid career. According to the table, this requires five to seven years' total experience or three to five years' seniority in a grade A post. The complainant is relying on five years, which he spent in grade B6 and the two years which he had by 1 April 2006 served in grade A2 to satisfy this experience requirement. In effect, his assertion is that Circular No. 271 Section II.A lays down that the minimum experience required for direct entry to grade A2 is five years. He argues that this meant that when he was promoted from grade B6 to grade A2, given his years of experience in the Organisation in grade B6, there must be an accepted assumption that he had the five years' grade A experience which is required for direct entry to grade A2.

12. It is noteworthy that Section III.A(ii) of Circular No. 271 states as follows:

"Promotion to A3 or A4 occurs at the earliest after 2 years in the grade occupied prior to promotion (Article 49(7) ServRegs)."

13. Section III.C provides for the circumstances in which category B and C staff are promoted to category A posts. It states as follows:

"Staff promoted from grade B6 are graded A2.

All other staff promoted to category A are graded A1.

Step in grade on promotion is determined in accordance with Article 49(11) ServRegs.

Subsequent promotion within category A is on the basis of seniority in category A, taking no account of service or credited prior experience in category B or C."

14. The complainant insists that he had the necessary requirements for promotion to grade A3 with effect from 1 April 2006, first, because he was on a rapid career path as he had constantly received very good to excellent assessments. He asserts, in the second

place, that he had and should have been credited with the five years' experience, which was required for his promotion from grade B6 to grade A2. In the third place, his insistence is that since his promotion to grade A2 he had two further years' experience, which gave him a total of seven years' experience and put him at the upper limit required for promotion to grade A3.

15. In reply, the Organisation submits that the complainant's assertions are flawed because Section III.C of Circular No. 271 expressly states that subsequent promotion within category A is on the basis of seniority in category A only, "taking no account of service or credited prior experience in category B or C". It is noteworthy that this was the main basis upon which the Internal Appeals Committee dismissed the complainant's internal appeal and the President adopted the Committee's opinion.

16. The complainant's further arguments in virtual response to this are best captured by the direct reproduction of paragraphs 7-10 of his rejoinder to the reply by the EPO in these proceedings before the Tribunal, in which he states as follows:

"7. In line with the above arguments staff appointed from B6 to A2 **must** be considered to have the equivalent of 5 years **recognised professional experience** in order to obtain grade A2. This requirement applies equally to externally recruited staff in order for them to obtain this grade.

8. Having established that external recruits to grade A2 are in an identical position to appointees from grade B6 in respect of recognised experience one must be able to expect that for further career opportunities the principles of equal treatment should and **must** apply. However, the arbitrary restriction of Part III C of Circular No. 271 discriminate against former B grade staff by ignoring at least 5 years of experience in their future career development.

9. It is difficult to follow the arguments put forward by the defendant with regard to equal treatment. It is the express wish of the administration to ensure that both external and internal applicants are accorded equal treatment. This cannot surely only apply to the way competitions are run. A true policy of equal treatment must also apply to the successful candidates once appointed and not to create a two class system – a normal career for externals and a second class career for internal appointees from

the B grades by ignoring the recognised experience and to start their career in the A category with a minus of 5 years seniority.

10. I consider that the claim for damages and costs is justified. By ignoring the provisions of the Service Regulations and the principles of equal treatment that the administration claim to uphold I am being discriminated against when compared to all external recruits who were assigned to grade A2 on their appointment by the failure to recognise the previous experience that was a requirement of my appointment to A2.”

17. In summary, these submissions by the complainant are that by not crediting him and other members of staff who are promoted internally from grade B6 to A2 with the five years’ experience which they required for promotion from grade B6 to A2, the Organisation is discriminating against them and not according them equal treatment to persons who are recruited from outside the Organisation directly into grade A categories.

18. The Tribunal has made consistent statements expounding the principle of equal treatment as follows, for example, in Judgment 2313, under 5:

“The principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently. In most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved. Even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference.”

19. It is clear that Section III.C of Circular No. 271 supports rather than detracts from the principle of equal treatment for all persons once they are recruited or promoted to a category A post. The basic requirement is that once recruited to that category, all persons, whether recruited externally with no prior EPO experience, or promoted internally, with prior EPO experience, no past EPO category B or C experience will be taken into account for subsequent promotion within category. All persons who are within any specific A category are placed on an equal seniority footing. Their promotion will be determined by the relevant years of experience within

the specific category and their career path, average or rapid, and their performance as reflected in their appraisal reports. It will also depend upon the existence of a vacant post, and in accordance with other criteria that are specified, for example in Article 49(1) of the Service Regulations of the EPO. In the end, promotion is to be “by selection” on a competitive basis and within the discretion of the President on the recommendation of the Promotion Board.

20. In the foregoing premises, the complaint is unfounded and is accordingly dismissed.

DECISION

For the above reasons,
The complaint is dismissed in its entirety.

In witness of this judgment, adopted on 1 November 2013, Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 5 February 2014.

Giuseppe Barbagallo
Michael F. Moore
Hugh A. Rawlins
Catherine Comtet