

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

**S. (Nos. 1 and 2)**

*v.*

**EPO**

**120th Session**

**Judgment No. 3535**

THE ADMINISTRATIVE TRIBUNAL,

Considering the first complaint filed by Mr J. A. S. against the European Patent Organisation (EPO) on 5 August 2011, the EPO's reply of 24 November 2011, the complainant's rejoinder of 16 January 2012 and the EPO's surrejoinder of 20 April 2012;

Considering the second complaint filed by the complainant against the EPO on 27 January 2012, the EPO's reply of 25 May, the complainant's rejoinder of 14 September and the EPO's surrejoinder of 20 December 2012;

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 cases may be summed up as follows:

In his two complaints, the complainant challenges in substance the effective date of his promotion.

The complainant joined the European Patent Office, the EPO's secretariat, as an examiner in grade A3 on 1 April 2001. In December 2007, following the complainant's request to that effect, the EPO recalculated his "reckonable previous experience" on recruitment within the meaning of Circular No. 271 of 12 June 2002 entitled 'Guidelines for applying Articles 3(1), 11(1) and 49 of the Service Regulations for permanent employees of the European Patent Office' (hereinafter "Circular No. 271"), to fourteen years and six months instead of twelve years and seven months. Thus, on 1 December 2007, his "total experience" within the meaning of the Circular No. 271 was assessed at eighteen years and three months, deduction having been made of two years and eleven months of experience acquired before the age of 25.

The complainant's case was submitted to the 2008 Promotion Board for assessment of a possible promotion from grade A3 to grade A4. His total experience was determined to be nineteen years and three months on 1 December 2008.

By a letter of 13 August 2008 the complainant was informed of his promotion to grade A4 with effect from 1 April 2008, namely with six full years in grade after confirmation of appointment and a total experience of eighteen years and seven months.

By a letter of 31 October 2008 the complainant challenged the date of his promotion, arguing that the decision to promote him with effect from 1 April 2008 was tainted by a mistake of law insofar as the Promotion Board misinterpreted the provisions of Circular No. 271, and that it breached the principle of equal treatment. He asked to be promoted with effect from 1 September 2003, when he had reached fourteen years of total experience. Subsidiarily, he requested a promotion to grade A4 with effect from 1 September 2005, when he had reached sixteen years total experience.

Considering that the rules had been applied correctly, the President of the EPO decided to reject his request for review by a letter of 18 December 2008 and to refer his appeal to the Internal Appeals Committee (IAC) for an opinion.

The EPO submitted its position paper on 17 December 2009 and a first hearing was held on 14 September 2010. During the hearing the chairman of the IAC requested the EPO to provide information concerning other similar promotions taking place in 2008. This information was provided to the IAC and to the complainant in December 2010. A second hearing was held on 8 February 2011.

In its opinion of 8 April 2011 the IAC unanimously recommended to cancel the decision to promote the complainant as from 1 April 2008 and to refer his case back to the Promotion Board for reassessment, taking due account of the complainant's merit. The IAC found that the Promotion Board had attached excessive weight to the criterion of "experience at the Office" over the criterion of "merit". It also found that, in the circumstances, applying the Promotion Board's established practice requiring that for a promotion to grade A4 the staff member must as a rule have performed consistently over the previous three reporting exercises, would amount to an improper exercise of discretion because the latter had failed to even consider applying the exception provided for in the Circular in light of his total experience. It unanimously recommended dismissing as unfounded the complainant's claim for moral damages on account of the EPO's alleged bad faith as well as his claim for damages on account of lost salary. Concerning his claim for moral damages on account of the excessive length of the proceedings, a majority recommended dismissing it on the ground that, given the special circumstances of the case, there had been no undue delay. A minority recommended awarding him 2,000 euros for the excessive length of the proceedings.

By a letter of 6 June 2011 the complainant was informed that the President had decided to follow the IAC opinion and to allow his appeal in part by referring his case back to the Promotion Board to review the date of his promotion to grade A4 in due consideration of the complainant's merit. He was further informed that if the Promotion Board found that the complainant should be promoted to grade A4 with retroactive effect from an earlier date than 1 April 2008, the EPO would pay the salary arrears with an interest rate of 8 per cent per annum. His request for moral damages was rejected in accordance

with the unanimous recommendation of the IAC. As regards the minority recommendation to award the complainant 2,000 euros for the length of the proceedings, the letter indicated that this award was not deemed justified, given the complexity of the subject-matter of his appeal and considering the special circumstances as outlined by the IAC. That is the decision impugned in the complainant's first complaint.

The 2011 Promotion Board reviewed his case in November 2011 and, by a letter dated 16 January 2012, the complainant was informed that the President had decided to endorse the Promotion Board's recommendation to advance the date of his promotion to grade A4 to 1 March 2007 in due consideration of his merit and cumulative experience in comparison with the other cases reviewed. The letter further indicated that the Promotion Board had also reconsidered his promotion to grade A4(2), but that in light of Circular No. 271, such a promotion may occur at the earliest after five years in grade A4. As his seniority in grade A4 at the time of the Promotion Board's review was assessed as four years and nine months, he was informed that his promotion to grade A4(2) could be considered at the earliest by the 2012 Promotion Board. That is the decision impugned in the complainant's second complaint.

On 27 January 2012 the complainant requested the review of the decision impugned in his second complaint, alleging a breach of the principle of equal treatment. His request was rejected by a letter of 27 March 2012 and was registered as an internal appeal. At the time when the EPO filed its surrejoinder on the second complaint, the internal appeal was still pending.

As the two complaints before the Tribunal are interrelated, the complainant asks the Tribunal that they be joined for the sake of procedural efficiency.

In his first complaint, he asks the Tribunal to set aside the decision of 6 June 2011 and to order that its scope be increased in two ways with respect to the instructions to the Promotion Board. Firstly, he asks that the Promotion Board be instructed to consider his eligibility for promotion to grade A4(2). Secondly, that it be instructed to provide

a reasoned opinion based on the standard applicable to the IAC. He seeks moral damages for the length of the proceedings, as well as costs.

In his second complaint the complainant asks the Tribunal to decide on the lawfulness of the decision of 16 January 2012 and, if the decision is found to be unlawful, to substitute its own assessment or direct a new assessment and remit the matter to the President for further consideration, including eligibility for promotion to grade A4(2). He also asks the Tribunal to order the payment of any additional salary arrears with an interest rate of 8 per cent per annum. He seeks moral damages, as well as costs, both to be awarded in conjunction with his first complaint.

The EPO rejects the complainant's claims as partly irreceivable and, subsidiarily, as entirely unfounded as regards his first complaint. As regards his second complaint, the EPO dismisses the complainant's claims as irreceivable and, on a subsidiary basis, entirely unfounded. It objects to the joinder of the two complaints on the ground that his second complaint is irreceivable. The EPO asks the Tribunal to order that the complainant bear his costs.

## CONSIDERATIONS

1. In his first complaint, filed on 5 August 2011, the complainant essentially impugns the EPO President's decision dated 6 June 2011 insofar as it did not include an explicit instruction to the Promotion Board to also consider any consequent eligibility for promotion to grade A4(2) while it was reviewing the complainant's retroactive date of promotion to grade A4, and as it rejected the IAC's minority recommendation to award the complainant 2,000 euros in moral damages for the excessive delay in the internal appeal proceedings.

2. In his second complaint, filed on 27 January 2012, the complainant impugns the EPO President's decision dated 16 January 2012, which endorsed the 2011 Promotion Board's recommendation to set the complainant's retroactive date of promotion to grade A4 to 1 March 2007. The complainant requested that this decision be

reviewed on 27 January 2012, alleging unequal treatment, and he received the President's decision to reject his request in March 2012, informing him that his appeal had been referred to the IAC for an opinion. This internal appeal, registered as case No. RI/18/12, is still pending. The complainant has asked that his two complaints be joined for the sake of procedural efficiency, considering that they are interrelated.

3. The EPO objects to the joinder of the complaints on the basis that it considers the second complaint to be irreceivable for failure to exhaust all internal means of redress. The Tribunal considers that the receivability of a complaint has no bearing on the issue of joinder, as joining complaints does not confer any automatic finding of receivability or founding on the merits. Thus the Tribunal finds it useful, under the present circumstances, to join these interrelated complaints and to address the issues raised therein in a single decision.

4. The complainant lodged a first internal appeal, registered as case No. RI/167/08, challenging the effective date of his promotion to grade A4. He claimed that the decision to promote him with effect from 1 April 2008 was flawed insofar as the 2008 Promotion Board had misinterpreted the provisions of Article 49 of the EPO Service Regulations and Circular No. 271. The IAC, in its opinion dated 8 April 2011, found that the decision to promote the complainant with effect from 1 April 2008 was based on an incorrect interpretation of the promotion criteria and therefore unanimously recommended that the case be sent back to the Promotion Board for reassessment, giving appropriate consideration to the complainant's merit. The President upheld that unanimous recommendation and accordingly referred the case to the 2011 Promotion Board for reconsideration. The EPO had previously informed the complainant (in a letter to the complainant dated 24 November 2010) that, should the appeal regarding his promotion to grade A4 be allowed following a recommendation of the IAC, the outcome would "automatically" be considered by the Promotion Board with regard to his possible eligibility for a retroactive promotion to grade A4(2). However, the President did not include that

explicit instruction in his final decision of 6 June 2011. The Tribunal is satisfied that the President considered such an explicit instruction unnecessary, because it was a clearly logical consequence of any reassessment of the complainant's promotion to grade A4. The Tribunal finds that the absence of such an explicit instruction in the impugned decision caused no injury to the complainant at that time and, therefore, that the complainant has no cause of action with respect to the related claim in his first complaint. However, considering that there was a possibility, though admittedly slight, that the Promotion Board could have interpreted the lack of explicit instruction to mean that there was no need to consider the subsequent eligibility for promotion to grade A4(2), his claim in that regard is considered premature insofar as he did not wait for the result of the Promotion Board's final reassessment. Considering that the 2011 Promotion Board has since ruled on his promotion, recommending that the complainant's promotion to grade A4 be effective from 1 March 2007 and stating that the first possible date for consideration of a promotion to grade A4(2) could only occur after the complainant had been in grade A4 for five years, the claims in this regard have been rendered moot.

5. With regard to the complainant's claim against the President's decision of 6 June 2011 insofar as it did not adopt the minority opinion's recommendation of an award of 2,000 euros in moral damages for the delay in the internal appeal proceedings, the Tribunal finds this claim to be well founded. The EPO took a year to file its position paper in response to the complainant's internal appeal. The Tribunal's case law has consistently held that an international organisation has an obligation "to take all requisite steps to ensure that requests presented by their officials are examined with acceptable promptness and that internal appeals procedures move forward with reasonable speed" (see Judgment 3117, under 26, and the case law cited therein). The total length of the internal appeal proceedings lasted about two and a half years. As the complainant's appeal was not complicated and the EPO has produced no convincing justification for its egregious delay in filing its position paper, the complainant is entitled to an award of damages. "The amount of compensation for

unreasonable delay will ordinarily be influenced by at least two considerations. One is the length of the delay and the other is the effect of the delay.” (See Judgment 3160, under 17.) In the present case, the damage caused by the delay is minimal considering that the outcome of the final reassessment of the complainant’s effective promotion date includes a retroactive payment of arrears with an interest rate of 8 per cent per annum, as suggested by the IAC and endorsed by the President, as well as consideration of any potential subsequent promotions stemming from the new effective date of the complainant’s promotion to grade A4. With that in mind, the Tribunal finds an award of 2,000 euros in moral damages to be appropriate and considers that it comprises moral damages stemming from the unlawful decision not to award him damages for the excessive delay.

6. In his first complaint, the complainant also asks the Tribunal to order the President to request the Promotion Board to present a reasoned opinion along with its promotion recommendation. The Tribunal holds that, as there is no established rule or regulation which requires the Promotion Board to provide reasoned opinions as is required of the IAC, it is beyond the Tribunal’s remit to require it to do so, particularly as the decision with regard to promotions is taken by the President and can be challenged in an internal appeal which can address the merits of the decision on the promotion in question. The IAC will then provide a reasoned opinion to the President who will then take the final decision.

7. The complainant filed his second complaint contemporaneously with his internal appeal, registered as Case No. RI/18/12, and has therefore pursued the matter in parallel proceedings. The complainant does not impugn an implied rejection of his internal appeal, nor did he receive explicit permission from the EPO to apply directly to the Tribunal. Thus, the Tribunal finds the complainant’s second complaint irreceivable for failure to exhaust all internal means of redress in accordance with Article VII of the Statute of the Tribunal. Accordingly, it must be dismissed in its entirety, with no prejudice to the complainant

who may still contest the final decision when it is eventually taken following the outcome of the pending internal appeal.

8. In light of the above, the decision of 6 June 2011 must be set aside insofar as it does not award the complainant moral damages for the delay in the internal proceeding RI/167/08. As the first complaint succeeds in part, the complainant is entitled to an award of costs which the Tribunal sets in the amount of 500 euros.

#### DECISION

For the above reasons,

1. The decision of 6 June 2011 is set aside insofar as it does not award the complainant moral damages for the delay in the internal proceedings.
2. The EPO shall pay the complainant 2,000 euros in moral damages.
3. It shall also pay him 500 euros in costs.
4. The complainant's second complaint is dismissed in its entirety.
5. All other claims are dismissed.

In witness of this judgment, adopted on 15 May 2015, Mr Giuseppe Barbagallo, President of the Tribunal, Ms Dolores M. Hansen, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 30 June 2015.

GIUSEPPE BARBAGALLO

DOLORES M. HANSEN

HUGH A. RAWLINS

DRAŽEN PETROVIĆ