Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

D. M. (Nos. 12 and 13)

v.

EPO

131st Session **Judgment No. 4391**

THE ADMINISTRATIVE TRIBUNAL,

Considering the twelfth complaint filed by Mr P. D. M. against the European Patent Organisation (EPO) on 21 March 2018 and corrected on 3 April, the EPO's reply of 16 August, the complainant's rejoinder of 26 November 2018, the EPO's surrejoinder of 5 March 2019, the complainant's further submissions of 1 August and the EPO's final comments thereon of 22 October 2019;

Considering the thirteenth complaint filed by Mr P. D. M. against the EPO on 26 September 2018, the EPO's reply of 14 January 2019, the complainant's rejoinder of 22 May and the EPO's surrejoinder of 29 August 2019;

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 may be summed up as follows:

The complainant challenges the decision not to promote him in the 2008 promotion exercise.

Facts relevant to this case are to be found in Judgment 4113 on the complainant's sixth complaint delivered in public on 6 February 2019. Suffice it to recall that on 7 December 2012, the President of the European Patent Office, the secretariat of the EPO, decided not to endorse the recommendation of the Promotion Board to promote the complainant to grade A4. On 5 February 2013 the complainant filed an internal

appeal against that decision. In March 2013 the complainant filed his sixth complaint directly with the Tribunal following a decision by the President to dissolve the Appeals Committee due to a flaw in its composition.

Effective 1 December 2015, the complainant took early retirement.

The internal appeal procedure initiated in February 2013 was resumed in October 2016. In its report of 30 August 2017, the Appeals Committee recommended that the President's decision be set aside on the basis that the complainant had not been given adequate reasons for the decision not to promote him. On 30 October 2017 the Vice-President, Directorate-General 4 (DG4), by delegation of authority from the President, decided to endorse that recommendation. The case was therefore remitted to the President for a new decision and the complainant was awarded moral damages in the amount of 4,000 euros.

By a letter of 2 January 2018 the complainant inquired about the time frame within which he could expect a new decision to be taken on his case. On 21 March 2018 he filed his twelfth complaint with the Tribunal against the EPO's failure to take a new decision.

By a letter of 29 June 2018, which is the impugned decision in the thirteenth complaint, the President of the Office decided not to promote the complainant to grade A4. The President stated that at the time the initial decision was taken, the complainant's return to the Office was uncertain because of his extended sick leave and it was therefore legitimate to link the decision on the promotion to an effective return to service, which did not materialise.

In Judgment 4113, the Tribunal dismissed the complainant's sixth complaint as irreceivable for failure to challenge a final administrative decision and therefore to exhaust internal means of redress.

In his twelfth complaint, the complainant asks the Tribunal to set aside the decisions of 7 December 2012 and 30 October 2017 and to order his retroactive promotion to grade A4 with effect from 2008 together with 8 per cent interest on the amount due as a result of his promotion. He claims moral damages for the length of the procedures and for the harm caused to his health and dignity. The complainant requests punitive damages for the hidden disciplinary actions taken against him as a staff representative at the material time and for the continued and prolonged actions against his dignity. He also seeks an award of costs.

The EPO asks the Tribunal to dismiss the twelfth complaint as unfounded.

In his thirteenth complaint, the complainant asks the Tribunal to set aside the President's decisions of 7 December 2012 and 29 June 2018 and to order his retroactive promotion to grade A4 with effect from 2008 together with 8 per cent interest on the amount due as a result of his promotion. He claims moral damages for breach of the Organisation's duty of care, for the length of the procedures, for the deliberate delays caused by the Organisation and for the harm caused to his health and dignity. The complainant requests punitive damages for the hidden disciplinary actions taken against him as a staff representative at the material time, for the continued and prolonged actions against his dignity and for deliberately providing false information to justify the non-promotion decisions. He also claims costs.

The EPO asks the Tribunal to dismiss the thirteenth complaint as irreceivable or, subsidiarily, as unfounded.

CONSIDERATIONS

1. The complainant seeks the joinder of his twelfth complaint and his sixth complaint as both are directed against the same initial decision of 7 December 2012 not to promote him to grade A4 on the recommendation of the Promotion Board constituted under Circular No. 271 (in force at the material time). The application is rejected as in Judgment 4113 (delivered in public on 6 February 2019) the Tribunal dismissed the sixth complaint as irreceivable because it did not challenge a final administrative decision.

The complainant also seeks the joinder of his thirteenth complaint and his twelfth complaint. The latter was directed against an implied decision concerning the same subject matter as the former, which is directed against the express final non-promotion decision of 29 June 2018. The EPO does not oppose this request. Given that these two complaints raise the same issues of fact and law and seek the same relief, they will be joined to form the subject of a single judgment, consistent with the Tribunal's case law (see, for example, Judgment 4262, consideration 2).

2. Shortly after the twelfth complaint was filed, the President took the new final decision of 29 June 2018. When the EPO submitted its reply to the twelfth complaint, it appended a copy of the express final decision and stated that, in the interests of procedural economy, it would treat the twelfth complaint as being directed against the express decision of 29 June 2018. In its reply to the thirteenth complaint, the EPO contends that the thirteenth complaint is irreceivable on the grounds that it merely duplicates the twelfth complaint and is therefore "without purpose". But this so-called "duplication" only arises because the EPO chose to reply to the twelfth complaint as if it impugned the express decision of 29 June 2018. Whilst this was appropriate in the circumstances, it has no bearing on the receivability of the thirteenth complaint. The only objection to receivability raised by the EPO is therefore rejected.

3. The central issue raised in these complaints is whether the President's decision of 29 June 2018 not to promote the complainant to grade A4 was unlawful, as the complainant contends. On 7 December 2012, a list of permanent employees who were to be so promoted was published. In Munich, where the complainant worked, 147 such employees were so promoted. However, his name was not included in the list. On that same date, the Principal Director, Personnel, informed other managers that the President had endorsed the Munich Promotion Board's recommendations for promotions to grade A4, except as far as the complainant was concerned. On the complainant's challenge, the President's 7 December 2012 decision was set aside on the basis that adequate reasons had not been given for not accepting the Board's recommendation to promote the complainant. The President was invited to take another decision explaining his reasons for not accepting the Promotion Board's recommendation. He did so in the 29 June 2018 decision, which the complainant impugns.

4. The Tribunal's role in cases which challenge a non-promotion decision is a limited one. Staff members of an international organization do not have an automatic right to promotion. It is established that an organization has a wide discretion in deciding whether to promote a staff member. The Tribunal will only interfere if the decision was taken without authority; if it was based on an error of law or fact, some material fact was overlooked, or a plainly wrong conclusion was drawn from the facts; if it was taken in breach of a rule of form or of procedure; or if there was an abuse of authority. Additionally, the Tribunal has

stated that since the selection of candidates for promotion is necessarily based on merit and requires a high degree of judgement on the part of those involved in the process, a person who challenges it must demonstrate a serious defect in the decision. The breach of a procedural rule is a flaw on the basis of which a decision not to promote a staff member may be set aside (see Judgment 4066, under 3).

5. The procedural rules which govern the promotion of EPO employees were provided by Article 49 of the Service Regulations for permanent employees of the European Patent Office, in force at the material time, which relevantly stated as follows:

"(1) A permanent employee may obtain a higher grade by a decision of the appointing authority:

[...]

(d) by promotion to the next higher grade in the same group of grades in the same category under the career system;

[...]

(4) Where the appointing authority is the President of the Office he shall take his decision after consultation of:

[...]

(b) the Promotion Board in the case referred to in paragraph 1(d) [...]

[...]

(7) Promotion to a post in the next higher grade within a group of grades 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. The employees must also fulfil the conditions of access referred to in Article 3, paragraph 1.

[...]

(10) The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraph 7 above.

The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration.

The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

6. The President, who was the appointing authority under Article 49(1), noted, in the 29 June 2018 impugned decision, that under Article 49(7) he exercised his discretion to select for promotion, in the 2012 exercise, permanent employees who possessed the necessary qualifications and who were recommended by the Promotion Board in accordance with the applicable rules. It is uncontroverted that in 2012 the complainant possessed the minimum qualifications for promotion from grade A3 to grade A4 under Article 49(7). The Board's recommendation to the President, pursuant to Section III(A) of Circular No. 271, to promote the complainant signified its satisfaction that he met the specified criteria for promotion based on merit and experience. The primary question is whether the President's decision not to promote him was flawed by error of law and/or fact, as the complainant contends. He also contends that the 29 June 2018 decision was taken in abuse of authority; in breach of the principle of equal treatment, as a hidden disciplinary sanction against him and was made in violation of the EPO's duty of care towards him.

7. The President's 29 June 2018 decision not to promote the complainant was rationalized as follows: the consequence of the Tribunal's case law regarding the discretionary nature of the appointing authority's decision to promote an employee means that "there is no right to a promotion [...] and even if a staff member is expecting it, he may not demand that management grant him the benefit of it from any particular date [...] Furthermore, it is intrinsic to a career system that it does not only reward past performance. It also adequately recognises in statutory and financial terms the suitability for, and accomplishment of, new roles with a higher level of complexity, quantity and/or quality. At the time the decision needed to be taken, however, [the complainant's] return to service was uncertain because of [his] (extended) sick leave. Therefore, and having regard to the possibility to backdate a promotion, it was considered legitimate to link a decision on the promotion to an effective return to service. This, however, did not materialise."

8. The EPO essentially repeats the foregoing reasoning in its reply to the complainant's contention that the impugned decision was flawed by errors of law and/or fact. Additionally, it states that notwithstanding that the Promotion Board recommended the complainant's promotion because he satisfied the criteria that the Board was required to consider

pursuant to Article 49(7) and Section III(A) of Circular No. 271, the President was not precluded from subsequently considering other factors such as the complainant's suitability for promotion before actually promoting him. The EPO insists that the President properly exercised his discretion not to promote the complainant on the basis that at the material time he had been on sick leave and his return to work was uncertain.

9. The complainant submits that in adopting Circular No. 271, the Administrative Council limited the President's power to promote a staff member to the provisions contained in that Circular. He however asserts that the President is required to provide good reasons for not accepting the Board's recommendation to promote him. It was for this very reason that the 7 December 2012 decision was set aside and the 29 June 2018 impugned decision was intended to provide adequate reasons to fulfil the duty to provide the complainant with adequate reasons.

10. Documentary evidence, which the EPO has not controverted, shows that the reasons stated in the 29 June 2018 impugned decision (reproduced at the end of consideration 7 of this judgment) are factually inaccurate. According to that evidence, the complainant's last period of sick leave, prior to the non-promotion decision of 7 December 2012, commenced on 27 August 2012 and ended on 14 September 2012. His subsequent period of sick leave following the same non-promotion decision was from 21 January 2013 to 1 February 2013. His return to work was therefore not uncertain at the material time as the impugned decision stated. Given the inaccuracy in the reasons given for not promoting the complainant, which also means that the discretion was exercised in an arbitrary manner, the 29 June 2018 impugned decision is flawed and will be set aside (see, for example, Judgment 3647, under 14).

11. Moreover, the complainant's argument that the decision not to promote him breached the principle of equal treatment or equality is well founded. Every permanent employee in the Munich Office whom the Promotion Board recommended in December 2012 for promotion from grade A3 to A4 was promoted, except the complainant. The case law states that in most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved and that 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 (see, for example, Judgment 4022, under 6). The EPO submits that the relevant difference between the complainant's situation and that of his colleagues who were promoted was his uncertain return to work. The factual inaccuracy of this statement, and the absence of any other justification, leads the Tribunal to conclude that there was no relevant difference that warranted the different treatment involved, and that the decision not to promote the complainant was taken in breach of the principle of equal treatment or equality.

12. The complainant asks the Tribunal to find, in effect, that he should have been promoted to grade A4 with effect from 2008, on the ground that the Promotion Board had so recommended. He requests related compensation. Inasmuch as no evidence was provided that the Promotion Board had recommended his promotion retroactive to 2008, and keeping in mind that it is not within the Tribunal's purview to order the promotion of an official (see Judgments 4066, consideration 11, and 4040, consideration 2), the complainant is entitled to material damages for the loss of a valuable opportunity to be promoted. The EPO will be ordered to pay the complainant a lump-sum amount equivalent to the cumulative amount of the additional salaries and all other benefits that he would have been entitled to receive through his monthly payslips, had he been promoted in the 2012 exercise, until the date of his retirement. However, as the decision of 7 December 2012 was set aside on 30 October 2017, the complainant's request to set it aside is moot.

13. The complainant's contention that the decision not to promote him was a hidden disciplinary sanction against him because he was a staff representative appointed by the Central Staff Committee as a member of the General Advisory Committee, to discourage employees from being staff representatives, is unfounded. The complainant provides no evidence, as against conjecture, to prove a nexus between the non-promotion decision and this allegation or from which it may be inferred that the decision was retaliatory (see, for example, Judgment 2907, under 23) or was actuated by prejudice.

14. The complainant's contention that the non-promotion decision breached the EPO's duty of care towards him because it was a continuation of years of organizational mobbing which he had suffered over a period of years is also unfounded. He provides no evidence from which the Tribunal may conclude that the decision not to promote him was an act of continuing harassment. It is noteworthy that the complainant had on a number of occasions engaged the EPO's harassment procedures, as evidenced in Judgments 3337 and 3695. The complainant's request for moral damages for breach of duty of care will accordingly be rejected, as will his request for moral damages for the length of the procedures deliberately delayed by the EPO and the harm caused to his health and dignity. While it is true that this procedure, which spanned almost six years for reasons mostly attributable to the EPO, was unreasonably long, the Tribunal considers that this excessively long period did not in itself cause serious injury to the complainant (see Judgment 4222, under 18). The complainant's request for punitive damages will also be rejected as the basis for its award has not been met. The Tribunal has stated, in Judgment 3966, under 11, for example, that an award of punitive damages can be made only in exceptional circumstances, for instance where an organisation's conduct has been in gross breach of its obligation to act in good faith.

15. The setting aside of the 29 June 2018 impugned decision entitles the complainant to costs for which he will be awarded 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision dated 29 June 2018 is set aside.
2. The EPO shall pay the complainant material damages in the terms stated in consideration 12 of this judgment.
3. The EPO shall also pay the complainant costs in the amount of 1,000 euros.
4. All other claims are dismissed.

In witness of this judgment, adopted on 22 March 2021, Ms Dolores M. Hansen, Vice-President of the Tribunal, Mr Giuseppe Barbagallo, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 14 April 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ