

I.
v.
EPO

132nd Session

Judgment No. 4420

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr T. I. against the European Patent Organisation (EPO) on 1 August 2018 and corrected on 27 August 2018, the EPO's reply of 8 January 2019, the complainant's rejoinder of 13 June and the EPO's surrejoinder of 30 September 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 Organisation's refusal to recalculate his reckonable previous experience.

By a letter of 30 May 2011 the complainant was offered a post of Head of Section at grade B4, step 1. A calculation of his previous reckonable experience for purposes of recruitment and promotion was attached to the letter. As the complainant accepted this offer, he took up his duties on 1 October 2011.

In June 2013 he applied for the position of Administrator, which was opened to internal candidates only, classified in the career group A4/A1. On 9 October he was informed that he was appointed to this position at grade A1, step 1, as from 1 October.

On 28 October the complainant filed a request for review of the 9 October decision asking that his previous "A-grade working experience" be taken into consideration for the calculation of his

step-in-grade assignment. On 12 December he was informed that the decision was maintained. Indeed, as he had previously held grade B4, he had been correctly assigned to grade A1, step 1, pursuant to Article 49(11) of the Service Regulations for permanent employees of the European Patent Office and Circular No. 271 relating to the implementation of the career system for category A.

On 16 December 2013 the complainant filed an appeal with the Appeals Committee, requesting that his A-grade working experience before entering the service of the EPO be taken into account for determining his new grade and step.

After having heard the parties, the Appeals Committee issued its opinion on 31 January 2018. It found that the complainant's duties did not correspond to those of an Administrator at grade A1. In order to respect the principle of equal treatment, it was the EPO's duty to assess which grade should have been assigned to the complainant. As it had not done so, the decision to assign him to grade A1 was legally flawed. The Appeals Committee therefore unanimously recommended to quash the decision of 9 October 2013, to reassess the complainant's grade and to award him moral damages in the amount of 300 euros for the excessive length of the internal procedure.

On 18 May 2018 the Vice-President of Directorate-General 4 (DG4), acting on delegation of authority from the President of the Office, informed the complainant that he had decided to uphold the decision of 9 October 2013. He also rejected the requests to reassess the complainant's previous A-grade experience upon appointment to the A-grade position and to recognise his compulsory military service on the ground that applicable provisions had been correctly applied. Nevertheless, he decided to pay him 300 euros in moral damages for the length of the internal procedure. This is the impugned decision.

The complainant asks the Tribunal to quash the decision of 18 May 2018 as well as those of 9 October 2013 and 12 December 2013 and to reassess his "grade" as from 1 October 2013 taking due consideration of his previous A-grade working experience and his compulsory military service. He also seeks the implementation of the recommendation of the Appeals Committee. He further asks that when his "grade and step" are re-assessed, consideration be given to his recognised excellent performance that was rewarded with "promotions and steps acquired" since his appointment as Administrator on 1 October 2013. Lastly, he

requests “[b]ack payments for the discrepancies in grade/step and resulting salary” as of 1 October 2013, with interest at the rate of 5 per cent.

The EPO asks the Tribunal to reject the complaint as irreceivable insofar as the complainant claims that his compulsory military service should be considered when re-assessing his grade. It argues that the claim that the complainant’s military service be taken into account is belated and therefore irreceivable, and that the complaint should be dismissed as unfounded in its entirety.

CONSIDERATIONS

1. By decision of 9 October 2013, following the internal selection procedure for vacancy notice TAI/5509, the complainant, a permanent employee in grade B4, was appointed with effect from 1 October 2013 to the post of Administrator in Principal Directorate 03 at grade A1. The complainant requested a review of the 9 October decision insofar as it assigned him to grade A1. The request was rejected, with reference to Circular No. 271 on the Implementation of the Career System for Category A and Article 49(11) of the Service Regulations, by decision dated 12 December 2013. The complainant appealed that decision.

2. In its opinion dated 31 January 2018, the Appeals Committee considered that the complainant’s allegation that the Office had breached its duty of care for failure to inform him about his possible future career at the Office was unfounded. It found the appeal to be receivable in its entirety, and unanimously recommended to:

- (a) quash the 9 October 2013 decision, confirmed by the management review decision of 12 December 2013;
- (b) reassess the complainant’s grade from the date on which he was appointed as Administrator in category A, with due consideration given to his past A-grade experience;
- (c) award him 300 euros in moral damages for the excessive length of the appeals procedure; and
- (d) reject the EPO’s allegation that the complainant’s request to consider and credit at 75 per cent the period of his compulsory military service for determining his reckonable experience with respect to his new position of Administrator, was irreceivable *ratione temporis*.

3. The Tribunal finds it useful to cite some relevant aspects from the Appeals Committee's opinion:

- “37. [...] the Appeals Committee understands that the rationale of Section III.C of Circular No. 271 was to consider the working experience of all employees at the same level, irrespective of whether they were recruited internally or externally. In the light of the foregoing, Section III.C of Circular No. 271 could not reasonably be interpreted in the sense that an employee's previous A-grade experience could not be taken into account when calculating his reckonable experience for the purpose of an appointment to an A-grade position, even if such experience had already been considered for determining his grade when he was formerly recruited on a B-grade position. The Appeals Committee is of the opinion that such [an] understanding of Section III.C of Circular No. 271 would have inevitably led to inadequate and inappropriate differences in treatment between external and internal recruits on an A-grade post under the old career system.
38. [...]
39. The relevant question to determine if the impugned decision entailed a breach of the principle of equal treatment is thus whether the [complainant] received equal pay compared to his colleagues who performed work of equal value when they were appointed as Administrators. The relevant reference group for assessing the existence of a possible violation of the principle of equal treatment is therefore composed of all the newly appointed Administrators who were recruited either internally or externally. The fact that, in the present case, only internal candidates could apply to the vacancy (TAI/5509), is irrelevant.
40. [...] According to the Director of Controlling Office's written testimony, the main reasons for the [complainant]'s selection for the post *'have been his working experience and broad knowledge, which he gained during his work as a management consultant [over 10 years] prior to his employment at the EPO'*. The Office does not rebut the [complainant]'s assertion that he has always *'[worked] independently in a broad and complex field of work in [his] job in the Controlling Office'*. In view of these various elements, it is evident that, from the outset, the [complainant] was to work independently and to fulfil duties that were beyond what could reasonably be expected from an Administrator graded A1.
41. As he was assigned to grade A1, the [complainant] received a remuneration which did not correspond to the effective level of his duties. He was thus not equally paid in comparison with external recruits who had a similar or equivalent A-grade professional experience and fulfilled an equivalent level of duties. It was therefore the duty of the Office, in order to abide by the principle of equal treatment, to initiate a specific procedure in order to assess which grade should reasonably have been assigned to the [complainant]. The [complainant]'s assignment to grade A1 when he was promoted to the position of Administrator should consequently be deemed legally flawed.”

4. Regarding the issue of receivability, the Appeals Committee considered that the complainant's reckonable military experience had been considered at the time he entered the Office in 2011. However, the Appeals Committee found the appeal to be receivable as it addressed a new decision, that is to say the 9 October 2013 decision. It did not consider that decision to be confirmatory of the 30 May 2011 decision, which concerned the calculation of the complainant's reckonable military experience at the time he joined the Office as a B-grade employee.

5. In the 18 May 2018 decision, taken by delegation of authority from the President, the Vice-President of DG4 endorsed the Appeals Committee's unanimous recommendation to pay the complainant 300 euros in moral damages for the length of the appeals procedure, but rejected the unanimous recommendations to quash the 9 October 2013 decision and to reassess the complainant's grade from the date on which he was appointed as Administrator, with due consideration given to his past A-grade experience. The Vice-President of DG4 based his decision on the applicable rules and in particular on the application of Section III.C of Circular No. 271, and on his disagreement with the reasoning of the Appeals Committee according to which the appointing authority should have treated the complainant as if he had been recruited through an external competition. He also maintained the view that external recruitment was fundamentally different from internal appointment/promotion.

6. The complainant bases his complaint on the following grounds:
- (a) Violations of the principles of equal treatment and equal pay for equal work;
 - (b) Breach of duty of care in failing to inform the complainant that his A-level experience would be forfeited by accepting the original B-grade appointment; and
 - (c) Misapplication of rules (Articles 11(1) and 49(9) of the Service Regulations and Circular No. 271).

He specifically claims that Article 49(9) of the Service Regulations, in conjunction with Section III.C of Circular No. 271, were not applicable to his case, which required instead the application of Article 11(1) of the Service Regulations in conjunction with Sections I and II of Circular

No. 271. He asserts that the non-application of those provisions resulted in the breach of the principle of equal treatment.

7. The Organisation contests the complaint's receivability insofar as the complainant claims that his compulsory military service should be considered in the reassessment of his grade A1. It submits that the complaint is entirely unfounded on the merits.

8. The main subject of this complaint is limited to the question of whether the complainant had the right to have his reckonable military and external A-grade experience considered when he was appointed to the position of Administrator in grade A1, having been successful in the competition referred to in vacancy notice TAI/5509, open to internal staff members only. The corollary of this limitation is that any matter raised by the complainant concerning the EPO's compliance with the rule of equal treatment for the service rendered or with its duty to ensure proper remuneration for the extra duties and responsibilities he discharged over and above those of his post, is irrelevant to the present case.

9. The decisive question is whether the applicable provisions referred to in Article 49(11) of the Service Regulations and Section III.C of Circular No. 271 could be applied to the complainant, whose situation was exceptional as he joined the EPO under the grade B4, step 1, considering that he was never a true B-level staff member in light of his academic qualifications and external A-grade work experience. Essentially, he was overqualified for the B-grade position. According to the complainant, his externally accumulated A-grade experience must be considered for the new position. The complainant argues that the non-application of Article 11(1) of the Service Regulations in conjunction with Circular No. 271, Sections I and II, and the application of Section III.C of Circular No. 271 resulted in a breach of equal treatment.

10. The relevant parts of Circular No. 271 provide as follows:

I. Reckonable previous experience

[...]

**II. Grade and step on recruitment
(Article 11 [of the Service Regulations])**

[...]

**III. Obtaining a higher grade
(Article 49 [of the Service Regulations])**

A. [...]

B. [...]

C. Category B and C staff appointed to category A

Staff appointed from grade B6 are graded A2.

All other staff appointed to category A are graded A1.

Step in grade on appointment is determined in accordance with Article 49 (11) [of the Service Regulations].

Subsequent promotion and/or appointment 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.”

11. The relevant Articles of the Service Regulations are as follows:

**“Article 11
Grade and seniority**

- (1) The appointing authority shall assign to each employee the grade corresponding to the post for which he has been recruited. Employees recruited to posts classified in a group of grades shall be assigned the grade corresponding to their reckonable previous experience, in accordance with the criteria laid down by the President of the Office.
- (2) Unless the appointing authority decides otherwise, for duly substantiated reasons relating to the training and special professional experience of the candidate, appointment shall be to the first step in the grade.

[...]

**Article 49
Access to a higher grade**

[...]

- (11) Subject to the provisions of paragraph 8, a permanent employee who obtains a higher grade shall be appointed or promoted to the lowest step in the new grade which carries a basic salary at least equal to that received in his former grade and step increased by the equivalent of one 12-monthly incremental step in his former grade. Where this is not possible, the employee shall be appointed or promoted to the last step in the new grade.”

12. The Tribunal finds that the Organisation correctly applied the norms contained in Article 49(11) of the Service Regulations and Section III.C of Circular No. 271, which specifically concern appointments from categories B and C to category A. Section III.C of Circular No. 271 foresees only grade A1 for a promotion from B4 to category A. An assignment of the complainant to a higher grade of A by applying the

norms which concern the recruitment of external candidates (“[e]mployees recruited” referred to in Article 11(1) of the Service Regulations) would have violated the norm set out in Section III.C.

The Tribunal finds that despite the complainant’s specific situation, the application of Section III.C did not entail any violation of the principle of equality by reference to the comparison between external candidates, whose A-grade professional experience would be considered when recruited to a position in category A, and internal candidates. The situation of the internal candidates, and specifically that of the complainant, is different from that of the external candidates (see Judgments 2859, consideration 6, and 3340, consideration 3).

13. Indeed, the complainant’s reckonable experience had already been considered by the EPO, as required by Section I(3)(b) of Circular No. 253, when he applied for the post of Financial Specialist for which he was recruited at grade B4. The complainant was appointed to the post of Administrator, following an internal procedure in which he was able to participate as an EPO employee holding grade B4, whereas external candidates could not participate. The complainant therefore enjoyed a favorable situation compared to that of external candidates. It is noteworthy that, in the same line, the Tribunal did not find any violation of the principle of equal treatment in the different evaluation of seniority set by Section III.C of Circular No. 271 (“no past EPO category B or C experience will be taken into account for subsequent promotion within category [A]”) for the purposes of career development in category A, between candidates appointed to the post of Administrator at grade A2 from grade B6 and staff members directly recruited externally in category A (see Judgment 3283, considerations 17 and 19).

14. The complainant submits that his period of compulsory military service was not considered as reckonable experience in the decision of 30 May 2011 despite the fact that, according to Section I(2) of Circular No. 253, periods of military service are considered professional activity when determining reckonable experience for posts of category B. The lack of any reaction on the part of the complainant, who did not contest the 30 May 2011 decision internally, implies that the denial of that benefit has become immune from challenge.

15. The complainant's claim of breach of duty of care is also unfounded. As the Appeals Committee found, when the complainant joined the EPO, he was provided with a copy of the Service Regulations and further regulations. Moreover, according to his duty to inform himself, the complainant should have asked the Office to clarify the conditions under which his promotion to category A could take place. As he failed to do so, his claim that the Office did not comply with its duty of information does not stand up to scrutiny (see Judgment 4196, consideration 4).

16. In light of the above considerations the complaint must be dismissed in its entirety.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 10 June 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 7 July 2021 by video recording posted on the Tribunal's Internet page.

DOLORES M. HANSEN

GIUSEPPE BARBAGALLO

HUGH A. RAWLINS

DRAŽEN PETROVIĆ