

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

105th Session

Judgment No. 2730

The Administrative Tribunal,

Considering the eighth complaint filed by Mr C. M. against the European Patent Organisation (EPO) on 12 February 2007 and corrected on 29 March, the Organisation's reply of 22 May, the complainant's rejoinder of 27 June and the letter of 11 July 2007 by which the EPO informed the Registrar of the Tribunal that it did not wish to enter a surrejoinder;

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

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Details of the complainant's career are provided under A in Judgments 1144 and 2264 delivered on 29 January 1992 and 16 July 2003 respectively, in which the Tribunal dismissed the complainant's sixth and seventh complaints concerning his staff reports. The complainant is a former grade A4 staff member of the European Patent Office, the EPO's secretariat, who retired on 1 September 2005.

In a letter of 9 December 2003 he claimed that although he had challenged his staff reports on numerous occasions for a number of years, they failed to reflect his "real merit", in particular the quality of his work. He requested that the President of the Office review his file with a view to granting him a promotion to grade A4(2) for 2003, given the "very difficult conditions" that had been imposed on him both within and outside the Office in order to destabilise him and "ruin" his health. By a letter of 15 January 2004 the Principal Director of Personnel informed the complainant that the President of the Office was unable to act contrary to the Promotion Board's negative recommendation, since it had been made on the basis of his staff reports which had been confirmed after a number of procedures. He pointed out that the criteria of age and seniority had been replaced by criteria related to a staff member's particular merit since the entry into force of Circular No. 271 of 12 June 2002 containing guidelines concerning the implementation of the career system for category A staff.

On 5 April 2004 the complainant filed an internal appeal against this decision. He contended, inter alia, that he should have been promoted prior to 2002, like other colleagues, on the basis of Circular No. 144 of 2 September 1985 containing the guidelines of 1 August 1985 for calculating the reckonable experience of category A staff for purposes of recruitment and promotion (career system). In any case, he argued, Circular No. 271 "ha[d] not changed anything [...] except in purely formal terms". By a letter of 10 May 2004 the Director ad interim of the Employment Law Directorate informed the complainant that the President of the Office could not grant his request and that he had decided to seek the opinion of the Internal Appeals Committee. In its opinion of 8 August 2006 the Committee unanimously recommended dismissing the appeal as unfounded. By a letter of 18 August 2006, which constitutes the impugned decision, the Director of Personnel Management and Systems informed the complainant that the President of the Office had decided, in accordance with the Committee's opinion, to dismiss his appeal. The complainant indicates on the complaint form that the impugned decision is based on the opinion of the Internal Appeals Committee, which was drafted in German, and that he "had to request" a French translation of the opinion, which he did not receive until 17 November 2006.

B. The complainant refers to the difficulties he has encountered in both his private and professional life, asserting that they constituted "means and pretexts not only for a planned and intentional slowdown but, more specifically, for a manifest and deliberate blockage" of his career for many years. Commenting on the Administration's reference to "private and professional setbacks" in the brief that it submitted to the Internal Appeals Committee, he notes that it prefers to speak of setbacks, "in other words the consequences rather than the

causes”, that is to say the “provocation and harassment” to which he was exposed.

The complainant criticises the subjective character of the Office’s staff reporting and promotion system, claiming that his staff reports failed to reflect his true merit. He alleges that certain EPO managers influenced his reporting officers so that he was awarded, at best, a rating of “good” under each staff report heading. This rating demonstrates, in his view, that while it proved impossible to detect any weaknesses or shortcomings in his work, his strong personality ruled out the possibility of crediting him with any particular merit.

He requests a retroactive promotion to grade A4(2) and/or compensation for the moral injury suffered.

C. In its reply the EPO submits that the complaint is time-barred inasmuch as it was not filed within the time limit of ninety days laid down in Article VII, paragraph 2, of the Statute of the Tribunal. It considers that this period ran from the date of receipt of the impugned decision of 18 August 2006, and not from the date of receipt by the complainant of the French translation of the Internal Appeals Committee’s opinion. The EPO points out that such a translation, which was provided at the complainant’s request, is not mandatory under the internal appeals procedure; it is required only for the purposes of the proceedings before the Tribunal. Moreover, the Organisation notes that the original version of the impugned decision is in French. Referring to Article 8(f) of the Service Regulations for Permanent Employees of the European Patent Office and the description of the duties of a grade A4 examiner, it affirms that the complainant, a former grade A4 staff member, is supposed to understand the Office’s three official languages. Basing itself on the complainant’s staff reports, the defendant notes that his passive knowledge of German is very good and that he lived in Munich for 25 years.

On the merits the EPO, citing the Tribunal’s case law, points out that decisions on promotion are a discretionary matter over which appeals bodies have only limited power of review.

It contends that the President of the Office can grant a promotion only on the basis of a favourable recommendation by the Promotion Board, a condition that was not met in the instant case. Citing section III.B of Circular No. 271, the defendant notes that promotion to grade A4(2) is reserved for staff who have demonstrated “particular merit”, assessed on the basis of staff reports or a comprehensive report prepared, where appropriate, at the request of the Promotion Board. As no such report was requested in the case of the complainant, his staff reports were the sole deciding factor. They made no mention of “particular merit”; from 1994 the complainant was assessed only as “good”, and a simplified report for the 2000- 2001 period merely stated that he met the normal requirements.

The EPO indicates that, prior to 2001, a staff member had to obtain a rating of at least “very good” for a minimum of five years to be promoted to grade A4(2). Although this criterion is no longer expressly mentioned in the Notes of the President of the Office to the Chairmen of the Promotion Boards, the minimum conditions remain applicable in the light of the stricter promotion criteria laid down by Circular No. 271.

The complainant was equally ineligible for promotion under the terms of Circular No. 144, which applied previously. He complains that, unlike other colleagues, he did not benefit from the application of that circular. But their ratings, unlike his, reached the level required for promotion. According to the EPO, it follows that the “comparability required to invoke the principle of equal treatment does not exist”.

Referring to the complainant’s various challenges to and adverse comments on his staff reports, the defendant asserts that the reports are no longer open to challenge.

With regard to the “non-legal” considerations invoked by the complainant to justify a promotion, the EPO replies that the sole factors to be taken into account are the “promotion criteria applicable to all staff members without distinction”. Any departure from the minimum conditions laid down by the regulations in force would be tantamount to discriminating against other staff members.

D. In his rejoinder the complainant rejects the EPO’s argument regarding the irreceivability of his complaint, affirming that it was filed after he received the translation of the Committee’s opinion, which was drafted in German, and that the Tribunal would in any case have requested a translation of that document into French or English. According to him, the Organisation’s position in that regard demonstrates its “patent and manifest” bad faith.

CONSIDERATIONS

1. The complainant joined the staff of the International Patent Institute in 1970. On 1 January 1978 he became a grade A2 examiner at the EPO, when the latter succeeded to the Institute. He was employed first in The Hague and later, from 1 April 1981, at the Organisation's headquarters in Munich. He was promoted successively to grades A3 and A4. He retired on 1 September 2005.

2. On 9 December 2003 the complainant asked the President of the Office to review his file with a view to granting him a promotion to grade A4(2). He maintained in particular that his staff reports did not reflect either his merits or the quality of his work, inter alia because they failed to take account of the fact that he was contending with difficult circumstances, beyond his control, both in the workplace and outside. This request was turned down on 15 January 2004, on the grounds that the President was unable to act contrary to the negative recommendation made by the Promotion Board.

The complainant filed an internal appeal against this decision, arguing that he should have been promoted like other colleagues. The promotion should have been given on the basis of both Circular No. 144, containing the guidelines of 1 August 1985 for calculating the reckonable experience of category A staff for purposes of recruitment and promotion (career system), and Circular No. 271 of 12 June 2002 containing guidelines concerning the implementation of the career system for category A staff. The latter circular had not, in his view, fundamentally altered the rules applicable to promotion. He stressed the difficulties he had encountered in both his professional and his private life, which the Organisation should have taken into account when considering his application for promotion.

The President of the Office decided to dismiss the appeal, endorsing the unanimous opinion of the Internal Appeals Committee of 8 August 2006. The complainant was informed of this in a letter dated 18 August 2006, which constitutes the impugned decision.

3. The EPO submits that the complaint was not filed within the time limit of ninety days laid down in Article VII, paragraph 2, of the Statute of the Tribunal.

The complainant wrote on the letter of 18 August 2006 that he had received it on 11 September 2006. Hence, by the time he filed his complaint, on 12 February 2007, the period that had elapsed since notification of the dismissal of his appeal considerably exceeded the statutory time limit for having recourse to the Tribunal. The complainant points out, however, that the letter in question enclosed only the original German version of the Internal Appeals Committee's opinion of 8 August 2006, to which the impugned decision referred. It has been established that a French translation of the opinion was not sent to the complainant until 17 November 2006.

4. Furthermore, anyone filing a complaint with the Tribunal must state in his brief the facts of the case and the pleas raised against the impugned decision (Article 6, paragraph 1(b) of the Rules of the Tribunal). He should do so by putting forward arguments that can reasonably be considered to support his case. At all events, the immunity that the complainant enjoys in respect of his litigation does not exempt him from the duty to refrain from violating the respect that any litigant owes to the opposing parties. The Tribunal does not have to tolerate the initiation of proceedings before it that are manifestly frivolous, wrongful or vexatious.

The complainant's arguments are based largely on a recapitulation of diverse forms of harassment that he allegedly suffered and to which he attributes his poor appraisal, the point that was invoked by the EPO to deny him promotion to grade A4(2). This line of reasoning consists basically of immoderate subjective criticism, frequently couched in terms that are offensive to the defendant, its management, its staff, third parties, and even the population of the country in which the Organisation has its headquarters. This kind of language, which furthermore in no way supports the arguments of the complaint, is inadmissible.

The remainder of the complainant's submission consists of a reference to arguments put forward in the internal appeal. This approach is inappropriate inasmuch as the reasons for the impugned decision were set out in proper and satisfactory form in the Internal Appeals Committee's opinion and were eventually communicated to the complainant in his native language. Any party who impugns a decision before the Tribunal must contest the grounds for the decision in a manner that enables the Tribunal to make an objective ruling on the merits of the complaint.

5. All issues of receivability raised may, however, remain undecided because the complaint is manifestly ill-

founded. The Tribunal will in any case refrain from taking into consideration the passages in the complaint that are couched in terms exceeding the bounds of litigious debate.

6. The complainant's request of 9 December 2003 to review his file with a view to granting him a promotion had to be considered in the light of Circular No. 271 of 12 June 2002. Promotion to grade A4(2) is governed by section III.B of this circular, which states:

“Promotion to A4(2) may occur at the earliest after 5 years in grade A4. It is reserved for staff who have demonstrated particular merit, either in their main duties or for example by taking on special duties such as training, tutoring, deputising for the director, project management, etc.”

This text no longer requires a candidate for promotion to have obtained a rating of at least “very good” in staff reports covering a minimum period of five years, which was the previous requirement set out in the Notes from the President of the Office to the Chairmen of the Promotion Boards. The Tribunal notes that this circular accords a greater measure of discretion to the competent bodies (particularly the Promotion Board), while placing greater emphasis on their duties of objectivity and impartiality vis-à-vis candidates for promotion. According to the Note from the President of the Office to the Chairmen of the Promotion Boards for the year 2003, promotion to grade A4(2) must be based on an assessment of particular merit on the basis either of staff reports or, if the Promotion Board so requires, of a detailed report, drawn up by the reporting officer and signed by the countersigning officer, which shows that the staff member has undertaken special duties that are not normally required of staff members at the A1/A4 grades.

7. The Tribunal recognises that bodies responsible for questions of promotion have broad discretionary authority, the exercise of which it reviews, in material terms, only from the limited perspective of obvious error.

The complainant, in contesting the EPO's exercise of its discretion, merely reiterates the immoderate criticism contained, *inter alia*, in his previous complaint, which led to the delivery of Judgment 2264, the reasons for which were stated at length. He provides no concrete evidence that might convince the Tribunal of the discriminatory or at least unduly subjective nature of the impugned decision. He does not even claim to have undertaken any of the activities required for promotion under section III.B of the relevant circular.

In these circumstances, the complaint must be dismissed.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 2 May 2008, Mr Seydou Ba, 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 9 July 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 14 July 2008.