

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

108th Session

Judgment No. 2906

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr S. C. against the European Patent Organisation (EPO) on 19 May 2008, the EPO's reply of 23 September, the complainant's rejoinder dated 27 October 2008 and the Organisation's surrejoinder of 5 February 2009;

Considering Article II, paragraph 5, 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. The complainant is a British national born in 1956. He joined the European Patent Office, the EPO's secretariat, on 1 June 1989 as an administrator at grade A3. On 1 January 1994 he was promoted to grade A4. He applied for the post of Head of the Administrative Council Secretariat at grade A5 twice, in August 2000 and in December 2001. The first time his application was not considered, as the Administration had decided not to fill the position, and the second time, it was unsuccessful.

By letter of 6 July 2005 the Director of Personnel Management and Systems informed him that the President of the Office had decided to promote him to grade A5 with effect from 1 January 2005; attached to the letter was the calculation of his incremental step on promotion. On 8 July the results of the 2005 promotion exercise were published on the Office's intranet site; the complainant's name appeared on the list of promotions from grade A4 to grade A4(2). The complainant's certificate of promotion to the post of administrator at grade A5, signed on 10 August by the President, was forwarded to the complainant, who acknowledged receipt of it on 17 August. At a meeting of 29 August with officials from the Principal Directorate Personnel, the complainant was told that his promotion to grade A5 had been the result of a clerical error and that the President's decision had in fact been to promote him to grade A4(2). He was handed a letter dated 22 August 2005, whereby the Principal Director of Personnel rectified the error, confirmed the President's decision to promote him to the post of Directorate assistant at grade A4(2) and requested him to return the letter of 6 July as well as the certificate of promotion. The Principal Director of Personnel also indicated that the undue payment of 121.01 euros would be deducted from his August salary. Enclosed with the letter was a corrected version of the letter of 6 July together with a new calculation of his incremental step on promotion and a certificate of promotion to the post of Directorate assistant at grade A4(2) signed by the President on 22 August 2005.

On 30 August 2005 the complainant wrote an e-mail to the Directorate Personnel Management and Systems requesting that the President's decision to promote him to grade A5 be respected and that he be reimbursed the amount withheld from his August salary. On the following day the Director of Personnel Management and Systems met with the complainant and reiterated that an error had been made in the implementation of the Promotion Board's recommendation. By letter of 5 September 2005 he confirmed that a clerical error had been made and that the President had decided to promote him to the post of Directorate assistant at grade A4(2), in

accordance with the Promotion Board's recommendation. He asked him to return the letter of 6 July and the certificate of promotion of 10 August without delay and indicated that "out of good will" the amount of 121.01 euros, which had been deducted from his August salary, would be reimbursed to him together with his September salary, but that his subsequent remuneration would be calculated on the basis of his grade, which was A4(2).

The complainant's promotion to grade A4(2) was announced in the EPO *Gazette* in September 2005. By letter of 9 September 2005 the complainant asked the President to uphold his decision of 6 July to promote him to grade A5, to confirm the certificate of 10 August and to reimburse him the amount deducted from his August salary. In the event that his request was not granted, he asked that his letter be considered as an internal appeal. On 8 November 2005 he was informed that the President had decided not to grant his request and to refer the matter to the Internal Appeals Committee. In its opinion of 14 January 2008 the Committee found that the complainant's promotion to grade A5 was unlawful and that the President was in fact obliged to reverse it, especially in light of the fact that the Office's interest in keeping promotions consistent with the applicable rules took precedence over the complainant's expectation of having the initial decision upheld. It unanimously recommended that the appeal be dismissed as unfounded. By a letter dated 29 February 2008 the complainant was informed that the President had decided to endorse the Committee's opinion. That is the impugned decision.

B. The complainant contends that the decision to promote him to grade A5 was lawful because it was taken by the President, who has exclusive authority on questions of appointment and promotion, and also because it was notified to him in accordance with standard Office procedures and, as the case law has it, a decision becomes binding on an organisation from the moment it is notified to the staff member concerned in the prescribed manner. In addition, he accepted the promotion decision in good faith, without raising any reservation as

to its validity, and he also received a certificate of promotion which unequivocally confirmed the President's decision to promote him to grade A5. He considers the arguments brought forward by the Office in the course of the internal appeal proceedings irrelevant to the lawfulness of the original promotion decision, given that they were based solely on an interpretation of the President's and the Promotion Board's intentions at the material time. He recalls that any steps leading to a final decision do not in themselves constitute decisions.

In the complainant's opinion, the Office's attempt to evade responsibility for its actions by suggesting that he should have been aware of the errors in the original promotion decision is unacceptable and defamatory. He asserts that a staff member must be able to rely on information communicated to him or her by the Office in the prescribed manner, especially when that information has been authorised by the competent department. Furthermore, the documents notifying him of the decision were signed by three different staff members from Personnel, none of whom contested their validity, and the certificate of promotion, which was signed by the President, was personally handed to him by his supervisor. Referring to the argument presented by the Office before the Internal Appeals Committee that his promotion to grade A5 was not possible, because the budget did not foresee the creation of a post at that grade in the Directorate where he served, he points out that at the material time the budget made provision for a large number of A5 posts in his Directorate. He also points out that it is a long-standing practice of the Office to offer personal promotions and to carry out reclassification of posts.

The complainant asks the Tribunal to quash the impugned decision and to recognise his promotion to grade A5 as lawful. He claims compensation for material and moral damages and costs.

C. In its reply the EPO asserts that the complainant's promotion to grade A5 had to be considered as unlawful and thus had to be reversed, because it was based neither on a recommendation of the Promotion Board nor on the prescribed selection procedure. It recalls that both the case law and Article 49 of the Service Regulations for Permanent Employees of the European Patent Office require that the President

make promotion decisions on the basis of the Promotion Board's recommendations and following consultation with that body. It further points out that grade A5 attaches only to the posts of Director and Member of a Board of Appeal and that advancement to that grade is possible only through appointment following successful participation in a competition.

The defendant explains that the President had in fact decided to promote the complainant to grade A4(2), in accordance with the Promotion Board's recommendation, but that due to a clerical error in the letter of 6 July and subsequently in the certificate of promotion of 10 August, the President's decision was not properly implemented. Indeed, the promotion documents erroneously indicated that the President had decided to promote the complainant to the post of administrator at grade A5. This, however, was a contradiction in itself, given that the post of administrator attaches exclusively to grades A4/A1. Hence, the incorrect handling of the promotion documents resulted in the complainant being promoted to grade A5 contrary to the Promotion Board's and the President's intention. The Organisation denies that it sought to evade responsibility and emphasises that it did inform the complainant of the error in good time. It dismisses as unconvincing the complainant's argument that he accepted his promotion in good faith, noting that, as he had previously applied for posts at grade A5, he must have been aware that such grade attaches only to specific posts to which appointments are seldom made. It also dismisses the allegation of defamation. It emphasises that personal promotions are exceptional and, in any event, of no relevance to the case at hand and that, contrary to the complainant's assertion, the 2005 budget made no provision for an A5 grade post in his Directorate.

The EPO argues that, in the absence of specific provisions in the Service Regulations dealing with the reversal or revocation of flawed administrative decisions, recourse should be had to the principles of administrative law, which provide *inter alia* that an administrative decision which is favourable to an employee may be reviewed or altered if the employer's interest in having it reviewed outweighs the

employee's interest in having it upheld. The defendant emphasises in this respect that its interest in keeping promotions consistent with applicable guidelines and in granting all employees equal opportunities for promotion must take precedence over the complainant's expectation that the original promotion decision be upheld.

D. In his rejoinder the complainant rejects the assertion that his promotion to grade A5 was unlawful. He asserts that it was consistent with Article 49 of the Service Regulations and that it conformed to the Office's normal practice, since the President regularly exercises his discretionary authority to upgrade a post from A4/A1 to A5 following a reorganisation of tasks and responsibilities. He disputes the Organisation's contention that the Promotion Board recommended that he be promoted to grade A4(2), noting that the Board's recommendation made no reference to any specific grade. He argues that, as his name was on the Promotion Board's list of candidates eligible for promotion, there was no question of other employees not being given equal opportunities for promotion; consequently, the original promotion decision was not contrary to the defendant's interest. He accuses the EPO of persistently attempting to cast doubt on his integrity and to intimidate him.

E. In its surrejoinder the EPO maintains its position in full. Relying on the Tribunal's case law, it emphasises that employees do not have an acquired right to be assigned to a particular grade or step and that appointment and promotion decisions are discretionary and subject to only limited review. It observes that it would have infringed the principle of equal treatment and its obligation to guarantee that promotions are consistent with the applicable provisions had it decided to uphold the complainant's appointment at grade A5. It denies the existence of a practice whereby a post is reclassified from grade A4/A1 to grade A5 and objects to the accusation that it attempted to cast doubt on the complainant's integrity and to intimidate him.

CONSIDERATIONS

1. The complainant joined the European Patent Office on 1 June 1989 as an administrator at grade A3. On 1 January 1994 he was promoted to grade A4 and on 1 January 2005 he was assigned to the post of senior executive assistant.

2. The complainant was informed by a letter of 6 July 2005 from the Director of Personnel Management and Systems that the President of the Office had decided to promote him to grade A5 as from 1 January 2005. This measure was then confirmed by a certificate, signed by the President on 10 August 2005 and communicated to the complainant on 17 August, which stated that he had been promoted to the post of “Administrator” at grade A5.

3. However, during a meeting with officials from the Principal Directorate of Personnel on 29 August, the complainant was handed a letter dated 22 August from the Principal Director of Personnel, informing him that the letter of 6 July and the certificate of 10 August contained an unfortunate clerical error and that he had in fact been promoted to grade A4(2), not grade A5. A new certificate, dated 22 August and stating that the complainant had been promoted to the post of “Directorate assistant” at grade A4(2), was enclosed with the letter.

4. Despite the apologies given to him at that juncture, the complainant was apparently deeply affected by this calling into question of his initial promotion to grade A5, and he protested against this new measure in an e-mail of 30 August 2005. He considered that, as he had accepted the promotion in good faith and *a priori* had no reason to doubt its validity, it could not lawfully be reversed in this manner.

A further meeting took place on 31 August, this time between the complainant and the Director of Personnel Management and Systems. In a letter of 5 September, the latter dismissed his claims and informed him that the additional salary of 121.01 euros which had been

deducted from his salary in August would be reimbursed out of goodwill in September.

5. On 9 September 2005 the complainant sent a letter to the President in which he asked him to uphold his promotion to grade A5 or, if his request was not met, to consider the letter as an internal appeal within the meaning of Articles 106 *et seq.* of the Service Regulations.

Since the President was of the opinion that he could not grant the complainant's request, he submitted the case to the Internal Appeals Committee pursuant to Article 109 of the Service Regulations.

6. By a decision of 29 February 2008 the new President of the Office endorsed the Committee's unanimous opinion of 14 January 2008 and dismissed the complainant's internal appeal.

This decision is challenged by the complainant before the Tribunal. He seeks the quashing of the decision and "recognition of the promotion [to grade] A5 as lawful". He also requests that the EPO should be ordered to pay him compensation for the material and moral injury which he believes he has suffered, as well as costs.

7. The nub of this case is whether the President could lawfully reverse the decision of 6 July to promote the complainant to grade A5, as he did on 22 August 2005.

Since the Service Regulations do not contain any specific provisions governing the conditions for the reversal or revocation of administrative decisions, this question can be settled only by referring to the general principles of law applied by the Tribunal.

8. In accordance with these principles, an individual decision affecting an official becomes binding on the organisation which has taken it and thus creates rights for the person concerned as soon as it has been notified to him or her in the manner prescribed by the applicable rules (see, for example, Judgments 2112, under 7(a), and 2201, under 4). As a general rule, such a decision may therefore be reversed only if two conditions are satisfied: the decision must be

unlawful and it must not yet have become final (see Judgments 994, under 14, or 1006, under 2). Furthermore, where an individual decision does not create rights, provided that the principle of good faith is respected, it may be reversed at any time (see Judgment 587, under 4).

9. The novel aspect of the instant case in relation to this case law is that the decision in question, which in principle, like any promotion, created rights, was reversed on the grounds that it was due solely to a clerical error.

10. In this connection, it should first be noted that, notwithstanding the complainant's protests in this respect, there is no doubt that the decision of 6 July 2005 did stem from such an error.

Indeed, it is clear from the submissions that the decision concerned one of several hundred promotions within the A4/A1 grade group announced in the context of the annual promotion exercise, which were based on recommendations from the Promotion Board. As it happens, these recommendations were summarised in a table which had the unfortunate disadvantage of not clearly showing the grade to which the Board was proposing to assign each of the officials in question. While this circumstance explains the error made, it does not offer any grounds for supposing that the Board – and subsequently the appointing authority which was bound by its recommendations – might have intended to appoint the complainant to grade A5 rather than to grade A4(2) like all the other staff members who were promoted at the same time under the same conditions. Indeed, the annual promotion exercise does not cover grade A5 appointments, these being reserved for certain specific positions (i.e. those of a director or a member of a board of appeal) which are normally filled by competition only. Moreover, the heading and captions in the above-mentioned summary table made it plain that the recommendations contained in that document concerned solely promotions from grades “A2 to A3, A3 to A4 and A4 to A4(2)”, with no mention of promotions to grade A5. It should further be observed that the promotion certificate issued on 10 August 2005 contained an inherent contradiction, because it promoted the complainant to

grade A5 in a post of “Administrator”, whereas, according to the classification of posts and corresponding grades or groups of grades annexed to the Service Regulations, this post corresponded to the A4/A1 group of grades and not to grade A5.

11. Since the decision to promote the complainant to grade A5 stemmed from a clerical error, i.e. a purely factual error, and not from a genuine intention of its author, the Tribunal considers that it did not create rights for the person concerned and that it could therefore be subsequently reversed.

Indeed, one of the essential requirements of any administrative decision is that it should be consistent with its author’s intention. Consequently, where that is not the case, it is important that the impact of the decision should be limited as much as possible, even though its existence cannot be denied. Similar considerations led the Tribunal to set aside the application of a decision resting on a purely factual error in an earlier case concerning the repayment of an indemnity which had been paid in error (see Judgment 1111, under 5). Although the instant case concerns a somewhat different issue, it is likewise appropriate to consider that the decision in question, which stems from a factual error, could not create any rights and that the competent authority was therefore entitled to reverse it at any time. Indeed, the opposite would be liable to conflict not only with the interests of the organisation concerned but also with the principle of equal treatment of officials, insofar as it could, in some extreme cases, result in preposterous individual decisions reached by pure oversight becoming final.

12. The Tribunal also considers that the decision of 6 July 2005 was manifestly unlawful. Not only did it rest on inaccurate facts, which circumstance alone was enough to make it unlawful, but the complainant’s promotion to grade A5 was also contrary to the applicable legal rules.

Although in theory the President of the Office may grant promotions at his or her discretion, the Tribunal’s case law has it that, in view of the crucial role assigned to the Promotion Board in the procedure laid down in Article 49 of the Service Regulations and

various subsequent guidelines, the President may promote someone only on the Board's recommendation (see Judgments 1600, under 10, and 1968, under 16 and 17).

Thus, even if it is assumed that the President of the Office had the authority to appoint an official to grade A5, not by the usual procedures but in the context of the annual promotion exercise, such a promotion would have been lawful only if it rested on a prior recommendation to that effect from the Board. In this case, however, as stated earlier, the Board had recommended that the complainant should be promoted to grade A4(2), not grade A5. For this reason, the decision of 6 July 2005 to promote the complainant to the latter grade was plainly unlawful.

13. Although, as earlier indicated, the decision of 6 July 2005 did not create any rights because it stemmed from a factual error, it could be reversed only on certain conditions dictated by the principle of good faith.

This principle requires, firstly, that the power to reverse a decision resting on a factual error must be exercised as soon as the competent authority notices the error in question and not at a later date chosen at its own convenience.

Secondly, this principle requires that if the person concerned by a decision resting on a factual error has not contributed to this error, he or she must not suffer any unfavourable consequences from the application of the decision in question during the period before it was reversed. In particular, it is thus essential that any remuneration received by the official concerned on the basis of this decision should not give rise to reimbursement or any other form of restitution.

14. In the instant case these conditions have indeed been observed by the EPO.

On the one hand, the decision of 6 July 2005, which was applied only until the entry into force of that of 22 August, was reversed as soon as the initial factual error was discovered.

On the other hand, it is clear that the complainant bore no responsibility for this error, and the additional salary of 121.01 euros which he had received in July 2005 pursuant to the decision which was subsequently reversed was ultimately refunded to him. Although at first the Organisation unlawfully deducted this sum from the complainant's salary for the following month and then wrongly considered that its reimbursement should be seen as a goodwill gesture rather than a legal obligation, the Tribunal can only find that this obligation was in fact honoured.

15. Since the decision of 6 July 2005 must therefore be deemed to have been lawfully reversed, the complainant's claims seeking the quashing of the President's decision of 29 February 2008 and "recognition of the promotion [to grade] A5 as lawful" must be dismissed. The same applies to his claims seeking compensation for the material and moral injury which he believes he has suffered, insofar as they are based on the alleged unlawfulness of the impugned decision.

16. With regard to moral injury, however, the complainant has good grounds for submitting, as he does in particular in his rejoinder, that the EPO's conduct towards him justifies an award of compensation in this respect.

Even though, as stated earlier, the Organisation was entitled to reverse the decision wrongly promoting the complainant to grade A5, the factual error on which its initial decision rested was nonetheless negligent. By submitting a draft decision whose content had not been properly checked for signature by the President, the services of the Organisation displayed gross negligence, which is even less excusable in view of the fact that individual decisions on promotion are of a particularly sensitive nature. The complainant obviously had cause to be extremely disappointed because, having been notified of this decision, he was then told that it had been reversed and that he had been promoted simply to grade A4(2). By proceeding in this manner the EPO breached the duty which the Tribunal's case law establishes

for every international organisation not to cause its staff unnecessary injury (see, for example, Judgments 1526, under 3, or 2007, under 11).

17. The Organisation submits in this connection that, in view of his length of service with the Organisation and the fact that in the past he had twice applied for an A5 post, the complainant could not reasonably have been unaware that access to this grade was impossible via the annual promotion exercise. This assertion, which, contrary to the complainant's opinion, cannot be regarded as either insulting or defamatory, is however irrelevant. The various paths to promotion within an international organisation such as the EPO are regulated by complex rules with which the staff cannot be assumed to be fully conversant and it is plainly up to the Organisation to ensure that the decisions which it takes in this respect are lawful. While the Tribunal will not accept the complainant's allegations that the EPO was guilty of dishonest conduct or attempts to intimidate him, it will order the Organisation to redress the moral injury caused by the initial error. In these circumstances, this injury may be fairly compensated by awarding the complainant damages in the amount of 3,000 euros.

18. Since he succeeds in respect of the latter measure, the complainant is entitled to costs, which the Tribunal sets at 500 euros.

DECISION

For the above reasons,

1. The EPO shall pay the complainant 3,000 euros as compensation for moral injury.
2. It shall also pay him costs in the amount of 500 euros.
3. All other claims are dismissed.

In witness of this judgment, adopted on 12 November 2009, Ms Mary G. Gaudron, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 3 February 2010.

Mary G. Gaudron
Seydou Ba
Patrick Frydman
Catherine Comtet