

118th Session

Judgment No. 3340

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr N. S. against the European Patent Organisation (EPO) on 23 April 2010 and corrected on 31 May, the EPO's reply dated 23 September, the complainant's rejoinder of 30 November 2010 and the EPO's surrejoinder of 10 March 2011;

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

Having examined the written submissions;

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

A. The complainant joined the EPO in 2002 as an administrator at grade A2. He was promoted to grade A3 in 2004. In September 2007 a vacancy notice was published for the post of Director, Buildings and Technical Installations, at grade A5. The complainant took part in the competition and was successful. He was appointed to the post with effect from 1 March 2008. A document entitled "Calculation of incremental step on promotion", dated 27 March 2008, informed him that he had been assigned to grade A5, step 1.

By a letter of 28 April 2008 the complainant requested a review of the step calculation on the ground that, contrary to what was

indicated on the document of 27 March, he had been appointed to the post of Director, not promoted. He therefore argued that the rules contained in 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 – Implementation of the Career System for Category A”, should apply and that his previous professional experience should have been taken into account in the calculation of his incremental step.

The complainant lodged an internal appeal on 29 May 2008 against the calculation of his incremental step, claiming that it put him at a disadvantage vis-à-vis external candidates and requesting that a different calculation method be used, which took into account his previous professional experience. By a letter of 26 June 2008, the Director, Employment Law, informed him that the President of the EPO considered that the relevant statutory provisions had been applied correctly and that his appeal had therefore been referred to the Internal Appeals Committee (IAC).

In its opinion dated 27 November 2009, the IAC found that the complainant’s step had been calculated correctly, as the higher grade had been obtained as a result of his appointment to a higher post, in accordance with Articles 49(1)(b) and 49(11) of the Service Regulations. The Committee found that the principle of equal treatment did not apply to the complainant’s case, as internal and external candidates were not in the same position in fact or in law. In this connection, it observed that the competition had by no means been “equal”, given that the complainant had had an advantage over external candidates due to his in-house experience. It unanimously recommended dismissing his appeal as entirely unfounded, which the President did by a letter of 25 January 2010. That is the impugned decision.

B. The complainant contends that he should have been assigned to grade A5, step 11, upon being appointed as Director, Buildings and Technical Installations. He successfully took part in the general competition, which was open to both internal and external candidates and which, in his view, focused on abilities and qualifications which

he had acquired outside the EPO. Having gained no advantage through his internal experience with the EPO, he should have been assigned to step 11, as any external candidate would have been. He argues that the disputed step calculation puts him at a disadvantage vis-à-vis external candidates to the extent that, while external and internal candidates were placed on an equal footing during the competition, different calculation methods were subsequently applied to internal candidates to evaluate their professional experience. This, he argues, constitutes a breach of the principle of equal treatment.

The complainant points out that, in accordance with the Service Regulations, he could not have been promoted directly from his grade A3 administrator's post to a grade A5 Director's post. Referring to the Tribunal's case law on the distinction between appointments and promotions, he disputes the EPO's position that the distinction has no significance when calculating the incremental step. He submits that the decision to advertise the post both internally and externally, and the criteria chosen, amount to an abuse of discretionary power and that questions of staffing policy, which may affect the articulation of the internal career structure, may not be taken into consideration once that internal career structure has been clearly articulated. Any ambiguities in the current regulations should be interpreted in favour of the staff. He therefore considers that Article 11 of the Service Regulations should apply, in conjunction with the calculation method of Circular No. 271, so that his professional experience of 13.5 years can be taken into account when calculating the incremental step in his new grade.

The complainant asks the Tribunal to quash the impugned decision and to order that he be upgraded to grade A5, step 11, with effect from 1 March 2008 and that his salary be recalculated on that basis. He claims material and moral damages in the amount of 5,000 euros, as well as 5,000 euros in punitive damages and 4,000 euros in costs.

C. In its reply the EPO argues that the complainant's allegation of unequal treatment is without merit. The Tribunal has consistently held, including in a case involving a very similar factual background,

that the principle does not apply in such cases, because the situation of internal candidates is different from that of external candidates, both in law and in fact. Having opted for a general competition to advertise the post, the EPO could not, by definition, restrict the professional experience required to that acquired internally without excluding external applicants. However, the chosen selection criteria do not mean that external and internal candidates, whose situations are different both in fact and in law, should be treated alike, particularly for step calculation purposes.

It notes that the complainant does not dispute that he has been appointed to the post, rather than promoted, nor does he dispute that there is a distinction between appointments and promotions, and that different rules may apply in determining the step on appointment and the step on promotion. The EPO denies his allegations of abuse of discretionary power and asserts that the calculation was correctly performed, in accordance with Article 49(11) of the Service Regulations, which is the *lex specialis* and which overrides the general provisions of Article 11, detailed in Section II.B of Circular No. 271. It considers that the complainant's underlying premise, that the EPO was not entitled to advertise the post both internally and externally, or that it was not entitled to determine the selection criteria chosen, is untenable in light of Articles 4(1) and 5(1) of the Service Regulations.

The EPO submits that the complainant's requests for damages and for the costs incurred before the IAC are not receivable, for failure to exhaust internal remedies. Referring to the Tribunal's case law, it points out that there are no grounds for an award of punitive damages either, as there is no evidence of ill will, malice or discrimination, and bad faith cannot be presumed. The request for costs is receivable only to the extent that it relates to costs incurred before the Tribunal.

D. In his rejoinder the complainant presses his pleas. He points out that the IAC suggested in its opinion that the EPO perform a concordance check on the linguistic aspects of all the relevant provisions. This suggestion was based on its finding that the

Administrative Council's decision of 25 October 2007, by which the EPO attempted to clarify the terminology used in the Service Regulations and, in particular, to eliminate any confusion and misinterpretations arising from the wording of the provisions governing promotions and appointments, had not achieved its purpose and that the new terminology was not even consistently used by the Administration.

E. In its surrejoinder the EPO maintains its position in full. The IAC confirmed in its unanimous opinion that, since the complainant was an internal candidate in the general competition, his step in his new grade A5 was correctly calculated in application of Article 49(11). It points out that a working group was set up shortly after the impugned decision to look into the linguistic issues identified by the IAC, and it produces the working group's Note to the EPO senior management, dated 25 January 2010, as an annex to its surrejoinder. However, it fails to see how the linguistic aspects of the relevant provisions would help the complainant's argument. Moreover, it denies that the complainant's experience within the EPO was irrelevant for the competition.

CONSIDERATIONS

1. The complainant was an administrator at grade A3. The EPO published a vacancy notice open to internal and external candidates for the post of Director, Buildings and Technical Installations at grade A5. The complainant applied for the position and was the successful candidate. He subsequently received a form entitled "Calculation of incremental step on promotion" informing him that his step-in-grade would be calculated at A5/01, in accordance with Article 49(11) of the Service Regulations. The complainant brought an internal appeal against this calculation of his step-in-grade that on the recommendation of the IAC was ultimately dismissed by the President.

2. The complainant submits that his step-in-grade should be calculated pursuant to Article 11 of the Service Regulations, using the criteria in Circular No. 271 and not under Article 49(11) of the Service Regulations. He points out the distinction in the Service Regulations between promotions and appointments and claims that he was appointed rather than promoted. He maintains that promotion refers to obtaining a higher grade within the same category under the general career system. In contrast, appointments occur upon recommendation of the Selection Board as a result of an internal appeal or general competition or following the reclassification of a post. The complainant adds that the decision to apply Article 49(11) for the purpose of calculating his step-in-grade was arbitrary and an abuse of discretion.

3. The complainant also contends the EPO breached the principle of equal treatment in the calculation of his step-in-grade. Although internal and external candidates are placed on an equal footing during the competition, different methods of calculating professional experience are applied to internal candidates. It is convenient to deal with this latter contention first. On the question of unequal treatment between external and internal candidates, the Tribunal held in Judgment 2859, under 6, that “as the situation of the former is different to that of the latter in fact and in law, there is no ground for that allegation”. Accordingly, the complainant’s assertion of unequal treatment is rejected.

4. Returning to the complainant’s primary submission, the following provisions of the Service Regulations are relevant to the discussion:

**“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**

- (1) A permanent employee may obtain a higher grade by a decision of the appointing authority:
- a) following appointment to a post under the provisions of Article 11 of the Convention;
 - b) following appointment to another post as a result of a general or internal competition in accordance with Article 4 of these Regulations;
 - c) following appointment after a reclassification of his post under Article 3, paragraph 2 of these Regulations;
 - d) by promotion to the next higher grade in the same group of grades in the same category under the career system.

[...]

- (8) Notwithstanding the provisions of the foregoing paragraphs, a permanent employee appointed in Grade A1 shall be promoted to Grade A2 as soon as he has the minimum number of years of professional experience required for that grade under the relevant job description; however, promotion to Grade A2 shall not pre-date the confirmation of this appointment. The step upon promotion to Grade A2 shall be determined in the light of the professional experience of the permanent employee.

[...]

- (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) Except in the case of appointment or promotion in the last step in the new grade, advancement to the next step in the higher grade shall be granted:
- a. after the period of time set out in Article 48 for advancement in incremental step, reckoned from the date of obtaining the higher grade, or

- b. after the period of time at the end of which the permanent employee concerned would have reached the next step in his former grade if this period of time is shorter and if the difference between the salaries before and after the date of obtaining the higher grade is less than twice the value of the step he occupied in his former grade.
- (13) In no case may the obtaining of a higher grade by a permanent employee result in a reduction in his total net remuneration.”

“Circular No. 271 (12 June 2002)

**Guidelines for Applying Articles 3(1), 11(1) and 49 of
the Service Regulations for permanent employees
of the European Patent Office**

Implementation of the Career System for Category A

I. Reckonable previous experience

Activity prior to recruitment to an EPO permanent post is credited for step-in-grade assignment and career development purposes in accordance with the rules below.

[...]

**II. Grade and Step on Recruitment
(Article 11 ServRegs)**

[...]

- B. Posts in Grade A5 or A6 for which the President is the Appointing Authority

The step in grade on recruitment will not exceed that which enables the staff member in question, having regard to his age on recruitment and to the step-advancement rules, to reach the last step in the recruitment grade at the age of 60.”

5. Article 11(2) only applies to “recruits”. The use of that word indicates that the article is to apply only to individuals recruited by the EPO. That in turn indicates it applies to persons recruited outside the EPO. It is inconsistent with the ordinary meaning of the word “recruit” to treat it as a reference to a person already in the employ of the Organisation. This is confirmed by Part II of Circular No. 271, which is entitled “Grade and step on recruitment (Article 11 ServRegs)”. In contrast, Part III of Circular No. 271 is entitled “Obtaining a higher grade (Article 49 ServRegs)”. Article 11(2) also

provides that the default step-in-grade for new recruits will be the first step of the new grade.

6. There is no dispute that the complainant was an internal candidate appointed to the post of Director following a general competition. This is one of the ways of obtaining a higher grade captured by Article 49(1). Based on the above discussion, it is clear that Article 11(2) has no application to the calculation of the complainant's step-in-grade and that the EPO's calculation was correct. Moreover, as Article 49(11) does not confer any discretion, it cannot be said that the impugned decision involved an abuse of discretion or was arbitrary.

7. As the complaint will be dismissed, a consideration of the EPO's submissions in relation to the receivability of the requested relief is unnecessary.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2014, Ms Dolores M. Hansen, Judge presiding the meeting, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 9 July 2014.

DOLORES M. HANSEN
MICHAEL F. MOORE
HUGH A. RAWLINS
DRAŽEN PETROVIĆ