

The Administrative Tribunal,

Considering the fourth complaint filed by Mr W. M. E. H. against the European Patent Organisation (EPO) on 20 June 2001 and corrected on 6 August, the EPO's reply of 24 October, the complainant's rejoinder of 6 November 2001, and the Organisation's surrejoinder of 25 January 2002;

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. Some facts relevant to the complainant's career at the European Patent Office - the EPO's secretariat - are set out under A in Judgments 722 and 2109 on his second and third complaints.

On 27 July 1999 the Director of Personnel informed the complainant of the decision taken by the President of the Office to promote him to grade A4(2) on 1 October 1999. The complainant, considering that the effective date should have been 1 January 1999, appealed against this decision on 10 August. In its opinion dated 1 June 2001 the Appeals Committee unanimously recommended to reject the appeal as unfounded. The President did so and the complainant was notified of this decision in a letter dated 13 June 2001 from the Director of Conditions of Employment and Statutory Bodies. That is the impugned decision.

B. The complainant asserts that the Office's practice of promoting permanent employees to grade A4(2) only when they have achieved a number of full years of experience is "unreasonable" and "absurd". It has led to errors and discrimination as someone with less experience can be promoted earlier than someone with more experience. He contends that the EPO could have used another method for choosing the date, such as promoting on the same date all permanent employees recommended for promotion by the Promotion Board. If all candidates selected for promotion in 1999 were considered to have the same merit, then they all should have been promoted on 1 January 1999.

He claims an advancement of his promotion date to 1 January 1999, payment of salary difference plus interest, and costs in the amount of 2,500 euros.

C. The EPO replies that the complaint is unfounded: there is no right to promotion. It is the Promotion Board that recommends promotion for a given year and it is the Administration that fixes the date. The President has the discretion to decide both whether and when a permanent employee should be promoted. Consequently, such decisions are subject to limited review by the Tribunal. Promotion to grade A4(2) is a "special promotion" which is restricted "to the most deserving cases"; it is essentially based on merit. The Office distinguishes between whether an employee should be promoted and when such a promotion should take place. It has chosen the effective date for the promotion to be the first day of the month when the employee attains a number of full years of experience. The complainant was recommended for promotion effective in 1999 and on 31 December 1998 he had 31 years and 3 months experience. It was not until 1 October 1999 that he had attained a number of full years of experience. This method is applied evenly by the Office to ensure that the principle of equal treatment is respected. The Appeals Committee unanimously concluded that this method is neither arbitrary nor unacceptable. In the EPO's view, the complainant's proposed method would lead to unequal treatment. It denies the complainant was discriminated against.

D. In his rejoinder the complainant submits that the Office's practice for determining the date of a promotion to grade A4(2) can lead to "nonjustified discrimination" and that everyone who had requested it should have been

promoted on 1 January 1999. He provides information on other permanent employees that he believes attained more advantageous promotion dates.

E. In its surrejoinder the EPO points out that the complainant has argued that he should have been promoted earlier because another staff member was erroneously promoted earlier than he should have been. But, as the Tribunal has consistently held, "equality in law does not embrace equality in the breach of it".

## CONSIDERATIONS

1. The complainant joined the staff of the International Patent Institute on 1 July 1972. He was transferred to the European Patent Office, on the merger of the Institute with the EPO in 1978. He was informed by the Director of Personnel on 27 July 1999 of his promotion to grade A4(2) effective as of 1 October 1999.

2. In a letter dated 10 August 1999, the complainant lodged an appeal addressed to the President of the Office asking to be promoted on 1 January 1999. He challenged the method of calculating his total professional experience which used 1 October 1967 as the "anniversary" of that experience.

3. The Director of Personnel Development informed him by a letter dated 8 October 1999 that, after an initial examination of the case, the President did not consider that his request could be granted and, therefore, referred the matter to the Appeals Committee.

In its opinion dated 1 June 2001 the Committee unanimously recommended that the appeal be rejected as unfounded. By a letter dated 13 June 2001, the President endorsed the opinion of the Appeals Committee and rejected the appeal. That is the decision impugned by the complainant.

4. In his complaint before the Tribunal the complainant seeks the following relief:

(a) an advancement of his promotion date to 1 January 1999;

(b) the payment of salary difference plus interest;

(c) costs in the amount of 2,500 euros.

5. The applicable provisions governing the complainant's promotion are not in dispute. They are: Article 49 of the Service Regulations for Permanent Employees of the European Patent Office, Circular No. 144 ("Guidelines laid down by the President of the Office on 1 August 1985 for calculating the reckonable experience of A staff for purposes of recruitment and promotion"), and the "Note from the President to the Chairmen of the Promotion Boards A2/3, A3/4 and A4/A4(2) for the year 1999".

6. The complainant criticizes the method for determining the promotion date as it comes down to "synchronising" the promotion with the number of full years of recognised professional experience. This does not take into account the other criteria necessary for the promotion. The rule can lead to discrimination, and this has actually happened. The President placed all selected candidates on the same level and then applied the synchronising criterion, putting the order of merit aside.

7. He considers as "absurd" the Office's practice of determining the date of promotion to grade A4(2) by fixing it as the date on which the permanent employee attains a number of full years of experience. If all candidates selected for promotion to grade A4(2) by the Promotion Board had the same merit, they ought to have been promoted with effect from the same date. If this had been applied to him, given the criteria of age and reckonable experience, he should have been promoted on 1 January 1999.

8. The EPO's arguments are as follows: it distinguishes between *whether* a staff member deserves promotion to grade A4(2) and *when* such a promotion takes place. It determines as the date of promotion the first day of the month in which a permanent employee reaches a number of full years of experience. On 31 December 1998 the complainant had 31 years and 3 months of reckonable experience. It was thus on 1 October 1999 that he attained 32 full years of experience and so it was on that date that his promotion to grade A4(2) took effect. Since this method is applied evenly, the principle of equality of treatment has been respected.

9. The instructions issued to the Chairmen of the Promotion Boards do not make a staff member's reckonable experience a decisive criterion for promotion to grade A4(2). Apart from the minimum conditions laid down in the instructions, the main factor is the staff member's performance. "Merits" are actually a matter of performance, as documented in particular in an employee's staff reports. Reckonable experience is not one of the merits.

10. There is no right to a promotion as this kind of decision involves the exercise of discretion and is subject to only limited review. The President's discretion goes beyond *whether* a staff member should be promoted and includes, consequently, *when* promotions should occur.

11. The Note from the President to the Chairmen of the Promotion Boards specifically lays out the guidelines for promotion from grade A4 to grade A4(2):

IV. ...

"The aspects of merit and selection as referred to in point I above are particularly relevant for promotion to A4(2). Here access should in principle be restricted to the most deserving cases, an A4(2) normally being entrusted with special tasks.

It is my intention to promote to A4(2) from among staff having a record of at least "very good" over a period of at least 5 years who have spent at least one full year in the final step of A4 and who are aged around 55 years, with variations upwards and downwards possible in the light of other circumstances, in particular that of performance."

The complainant, however, cannot claim a right to promotion just because he fulfils the minimum conditions set out in the guidelines. Promotion to grade A4(2) is a special promotion since "access should in principle be restricted to the most deserving cases".

12. While the Tribunal accepts that the decision as to whether and when to promote is a matter for the President's discretion, and that it will only interfere with such exercise on very limited grounds, it remains that the exercise cannot be carried out in a purely arbitrary or capricious manner. Nor can it be argued that because a policy is applied equally to all it is thereby any less arbitrary.

13. The EPO admits that the President treated all those who were recommended for promotion by the Promotion Board as being of equal merit. All of them had achieved the necessary prerequisites in terms of years of service and other listed criteria. No effect was given to the ranking of the candidates which was made by the Board. The effective date of each promotion was determined exclusively by the date of the month on which each permanent employee had entered the service of the EPO thirty or more years previously. The EPO expressly denies that this date has any relevance to the decision as to when a candidate should be promoted.

To use the month of entry into service in order to determine the date on which a deserved and merited promotion should take effect is, therefore, purely arbitrary and cannot validly serve as the basis for such a determination. The impugned decision cannot stand.

## DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The complainant's promotion will take effect on 1 January 1999. He is entitled to retroactive payment of salary differences plus interest at 8 per cent per annum.
3. The EPO shall pay the complainant the sum of 500 euros for costs.

In witness of this judgment, adopted on 3 May 2002, Mr Michel Gentot, President of the Tribunal, Mr James K. Hugessen, Judge, and Mrs Flerida Ruth P. Romero, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 15 July 2002.

Michel Gentot

James K. Hugessen

Flerida Ruth P. Romero

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 22 July 2002.