

**NINETY-EIGHTH SESSION**

**Judgment No. 2412**

The Administrative Tribunal,

Considering the sixth complaint filed by Mr J. D.-S. against the European Patent Organisation (EPO) on 10 September 2003 and corrected on 29 September, the Organisation's reply of 19 December 2003, the complainant's rejoinder of 20 January 2004 and the EPO's surrejoinder of 20 February 2004;

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. Facts relevant to this case are to be found in Judgment 2299, delivered on 4 February 2004, which concerned the complainant's fifth complaint.

On 3 July 1998 the Director of Personnel Management informed the complainant that the President of the European Patent Office, which is the secretariat of the EPO, had decided to promote him to the post of Directorate Assistant at grade A4(2) with effect from 1 June 1998. In a letter of 10 July the complainant – who held grade A4 – refused that promotion, stating, in particular, that he deserved grade A5. The Director of Personnel Management informed him on 29 July 1998 that the President had noted the refusal and had cancelled his earlier decision.

On 22 October 2001 the complainant asked to be promoted to that same grade A4(2). A list was published on 9 November 2001 giving the names of officials of the Office who had been promoted, but the complainant's name was not included.

In January 2002 the staff were informed that Mr C., an official whose promotion from grade A3 to A4 had been set aside by the Tribunal in Judgment 1968 – delivered on 12 July 2000 – was to be assigned to a grade A4(1) post until further notice, as his promotion to grade A5 had been cancelled. In letters dated respectively 4 and 5 February 2002 the complainant, pointing out that his name was not included on the list of promoted officials, denounced what he considered to be a breach of the principle of equal treatment. He also asked the President of the Office to promote him to grade A4(2) with retroactive effect from 1 June 1998, failing which his letters were to be considered as initiating internal appeals. As the complainant's request did not receive a favourable reply, the two appeals were referred to the Appeals Committee under references RI/7/02 and RI/8/02.

On 22 March 2002 the Promotion Board recommended promoting the complainant to grade A4(2) as from 1 November 2001, that is to say, the first day of the month following his request for promotion in October 2001. As this recommendation was accepted, the Principal Director of Personnel informed him of that fact in a letter of 23 April 2002. On 21 June 2002 the complainant wrote to the President asking for his promotion to be backdated to the date of the "offer" of 3 July 1998, failing which his letter should be considered as an internal appeal to be joined with the aforementioned appeals RI/7/02 and RI/8/02. This appeal was likewise referred to the Appeals Committee and registered under reference RI/39/02.

On 19 March 2003 the Appeals Committee issued a report stating that the three appeals were irreceivable insofar as they sought the granting of a promotion with retroactive effect from a date prior to 2001. In its view, there was no special circumstance that justified re-opening the time limits for appeal. It recommended nevertheless that the Promotion Board should review the case, on the grounds that the Board might have been unaware that, as the complainant's request for promotion had been made in October 2001, it would be possible to promote the complainant "at least during the current reporting period, i.e. from January 2001". The President of the Office accepted that recommendation. In a letter of 8 August 2003, which constitutes the impugned decision, the Principal Director of Personnel informed the complainant that the Promotion Board had recommended promoting him with retroactive effect from 1 November 2001 and that the President had endorsed that recommendation.

B. The complainant contends that his appeals were receivable in view of circumstances which justified re-opening the time limits. He maintains he was misled as to the policy governing appointments to grade A5 posts. He points out, moreover, that it was not until June 2003 that he was sent a brochure indicating that grade A4(2) officials could apply for A5 positions.

On the merits, he explains that he refused a promotion in July 1998 in order to safeguard his chances of being promoted to grade A5. He maintains that had he been informed of the applicable rules, he would not have felt “obliged” to turn down the promotion. He adds that the Appeals Committee found that he could be promoted from January 2001, since his request had been made on 22 October 2001, but the Promotion Board disregarded that opinion. He also considers it unfair that Mr C. should have received remuneration to which he was not entitled, while his own salary has remained at a level below the grade that he has deserved for many years.

The complainant asks the Tribunal to find “that the appointing authority acted abusively”, to grant him grade A4(2) with retroactive effect from 1 June 1998, and to order payment of the difference in salaries plus interest at the rate of 8 per cent per annum. He also claims damages for moral and material injury, and costs.

C. In its reply the defendant contends that the Tribunal is not competent to order the complainant’s promotion to grade A4(2) and that the corresponding claim is therefore irreceivable. It also argues that the complainant is time-barred from challenging the decision of the President cancelling his initial promotion, since that decision was dated 29 July 1998 and he submitted his appeals only in 2002. Pointing out that the complainant asked for promotion on 22 October 2001, it submits that his request of 4 February 2002 was receivable *ratione temporis* only with respect to the period subsequent to 22 October 2001. Given that the complainant has in fact been promoted with effect from 1 November 2001, it considers that the complaint is unfounded.

On the merits, the Organisation argues that there is nothing to indicate that the decision to promote the complainant with effect from 1 November 2001 was arbitrary. It recalls that, according to the Tribunal’s case law, the choice of the date of a promotion lies within the discretion of the President. In this case, the date of 1 November 2001 was chosen for objective reasons, since it is related to the complainant’s request of 22 October 2001. It considers furthermore that the procedure was properly applied: it notes that the members of the Promotion Board were divided regarding the wording of the final recommendation, which indicates that the possibility of promoting the complainant at an earlier date had indeed been considered. The EPO also rejects the explanations given by the complainant to justify his decision to refuse the promotion he had been offered in July 1998. In its view nothing obliged him to turn it down.

D. In his rejoinder the complainant endeavours to show that there is no reason why the issue of whether the cancellation of his promotion in July 1998 was valid should not be considered in these proceedings. He adds that for years the EPO has pursued “a deliberate policy of hostility towards staff”, which explains why he took his decision of 10 July 1998.

On the merits, he contends that the decision to promote him with effect from 1 November 2001 ignored both the principles set out in Judgments 2140 and 2221 and the opinion of the Appeals Committee. In his view, in refusing to change the date the EPO acted arbitrarily and abused its authority. He explains that he was unable to claim grade A4(2) earlier than October 2001 on account of the dilatory attitude adopted by the Organisation.

E. In its surrejoinder the EPO maintains its objections to the receivability of the case. It contends that it committed no fault which could be considered as grounds for the complainant’s decision of 10 July 1998 and that he cannot blame the Office for his own mistakes. The defendant considers that the decision setting the date of promotion is not tainted by any fatal flaw.

## CONSIDERATIONS

1. The complainant applied on several occasions for vacancies for technically qualified members of the Boards of Appeal at grade A5, without success. The appeals he initiated in this respect led to Judgments 1559, 1832, 1891, 2040 and 2299.

On 3 July 1998 he was informed that he had been promoted to the position of Directorate Assistant at grade A4(2) with effect from 1 June 1998. On 10 July he refused that promotion on the grounds that he deserved an A5 grade

and that he had filed an appeal on that issue with the Tribunal. On 29 July 1998 the Director of Personnel Management informed him that the President of the Office had noted the refusal and had cancelled his decision of 3 July 1998.

2. On 22 October 2001 the complainant asked for promotion to grade A4(2). While his request was being processed, he filed two internal appeals, on 4 and 5 February 2002, to obtain the promotion with effect from 1 June 1998. On 23 April 2002 he was informed that his promotion had been granted, but with effect from 1 November 2001, the first day of the month following his request.

On 21 June 2002 the complainant asked the President of the Office to reconsider the decision of 23 April, as he wanted his promotion to be backdated to the date of the “offer” of 3 July 1998. He referred the matter to the Tribunal as part of his fifth complaint, which led to the delivery of Judgment 2299; in that judgment, under 4, the Tribunal found the complaint irreceivable on that issue, since it had been filed while an internal appeal procedure was still under way.

After the conclusion of that appeal procedure and after consulting the Promotion Board, the President of the Office decided to maintain 1 November 2001 as the promotion date. The complainant was informed of that decision by a letter of 8 August 2003 from the Principal Director of Personnel, which constitutes the impugned decision.

3. Since the parties’ submissions are sufficiently detailed, oral hearings are not necessary and the complainant’s application to that end is disallowed.

4. The matter at issue in the complaint is the refusal to promote the complainant to grade A4(2) with effect from 1 June 1998. A decision of this kind lies at the discretion of the President of the Office. It may be reversed therefore only if it was taken *ultra vires* or shows a formal or procedural flaw or a mistake of fact or law, or if some material fact was overlooked, or if there was misuse of authority or an obviously wrong inference from the evidence. The Tribunal will be especially wary in reviewing such a decision (see Judgments 724 under 3, 1556 under 5, and 2262 under 2 *in fine*).

The matter in dispute does not, however, directly concern the President’s discretion, except perhaps with respect to one point, apparently of subsidiary importance, which will be dealt with further on. The complainant in a sense requests the revival of a decision which was taken in his favour but revoked at his own request more than three years before he filed the three internal appeals which led to the adoption of the impugned decision. Had the complainant directly challenged the decision of 29 July 1998 in those appeals, they would have been time-barred under Article 108 of the Service Regulations, according to which an appeal must be lodged within a period of three months from the disputed decision; in view of the material circumstances, the complaint would probably have been found irreceivable, which would have provided support for the principal pleas of irreceivability put forward by the EPO in its reply and its surrejoinder. This issue may, however, remain in suspense since the grounds on which an objection to receivability might be sustained also lead to the conclusion that the complaint is unfounded.

5. The complainant argues essentially that his refusal on 10 July 1998 of the offer he had received of promotion to grade A4(2) was based on invalid consent. According to him, his intention was not to refuse the promotion but to avoid jeopardising either his chances of being promoted to grade A5 or the complaint he had filed with a view to obtaining that grade, which was still pending before the Tribunal. He maintains that in addition he was deliberately left uninformed— until June 2003 – regarding the rules on appointments and promotions in the Office.

This argument is irrelevant. The refusal he expressed on 10 July 1998 is a very clear expression of his intention and is therefore not subject to interpretation. On that day the complainant informed the Director of Personnel Management that he was refusing the promotion he had just been granted on the grounds that he deserved grade A5, for which he had filed a complaint before the Tribunal. The appointing authority was perfectly entitled in response to such a statement to cancel his decision to promote the complainant. The latter’s expression of his intention was not tainted with any flaw, let alone with misrepresentation as he seems to suggest. There was nothing in the behaviour of the appointing authority which allowed the complainant to consider his promotion to grade A5 as certain or probable or even likely, or reasonably to conclude that it would be jeopardised if he accepted a promotion to grade A4(2). He must have been aware that under the European Patent Convention promotion to those two grades does not depend on the same body: the appointment as Directorate Assistant at grade A4(2) was a matter for the President of the Office to decide (Article 10(2)(g)), whereas the members of the Boards of Appeal

are appointed by the Administrative Council (Article 11(3)). The complainant was therefore at liberty to accept his promotion to the A4(2) post on a provisional or conditional basis, while pointing out that he was taking steps to obtain promotion to grade A5. He thus – in full knowledge of the facts – waived a right which, though it had been formally conferred on him, was retractable. That is to say he was fully aware of the objective risk that, by his refusal, he might temporarily forfeit any promotion at all in the event that his request for grade A5 was unsuccessful.

When his request was turned down, in fact, the complainant did not act as might have been expected if, as he maintains, his refusal of 10 July 1998 had been based on invalid consent. It was not until towards the end of 2001 that he went back on his refusal, yet that delay was not warranted objectively by any of the circumstances he alleges. It must therefore be concluded that his refusal of 10 July 1998 maintained its effects until 22 October 2001. Any conclusion to the contrary would in fact be a breach of the principle of the stability of administrative decisions in force and the principle whereby good faith must prevail in relations between an organisation's staff and its administration.

The complaint must therefore be dismissed to the extent that it aims to obtain for the complainant a promotion with retroactive effect from 1 June 1998.

6. Following a somewhat sibylline reasoning, the complainant appears to complain subsidiarily that the Appeals Committee's opinion was not adopted. The Committee had recommended that the President should refer the case to the Promotion Board to ascertain whether it was possible to give the promotion decision of 23 April 2002 retroactive effect from 1 January 2001, on the grounds that, the complainant having asked for promotion at the end of October 2001, the promotion could, in the Committee's view, take effect during the current reporting year.

The complainant does not contend that there is a general principle whereby promotion decisions taken in the course of a year which is a reporting year must take retroactive effect from the first day of that year; nor does he refer to any provision of any applicable texts which would impose such an obligation on the appointing authority or allow an official the right to be promoted retroactively to 1 January of the year in which he submitted his request. On that point the decision therefore lies within the discretion of the President and there is no indication in the submissions that the latter exceeded his authority in exercising that discretion.

7. It is finally worth recalling that the chief executive, who enjoys broad discretion, is not obliged to adopt identical solutions in comparable situations; to impose such an obligation would indeed be tantamount to undermining that discretion (see Judgment 2262, under 6(c) *in fine*). He must simply ensure that the exercise of his discretion is not tainted with arbitrariness. A comparison of the cases referred to by the complainant in support of his plea of unequal treatment does not show that there was abuse of discretion by the appointing authority in order to grant undue benefits to other persons.

8. Since the main claims fail, so do the related subsidiary claims.

## DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 18 November 2004, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Judge, and Mr Claude Rouiller, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 2 February 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 17 February 2005.