

**NINETY-NINTH SESSION**

**Judgment No. 2447**

The Administrative Tribunal,

Considering the complaint filed by Mr F.C. d. R. against the European Patent Organisation (EPO) on 6 August 2004, the Organisation's reply of 15 November, the complainant's rejoinder of 1 December 2004 and the EPO's surrejoinder of 11 January 2005;

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. The complainant, a Portuguese national born in 1965, joined the European Patent Office, the secretariat of the EPO, on 1 September 1998 as an examiner at grade A2. He was promoted to grade A3 as from 1 July 2000 and he resigned with effect from 31 December 2001.

Holding the view that the professional experience he had acquired while preparing his doctorate should at the time of his recruitment have been credited as "professional activity" at the rate of 75 per cent rather than 50 per cent as was the case, the complainant lodged an initial appeal on 18 May 2001, registered under No. 49/01.

On 18 September 2001 he filed a second appeal, registered under No. 67/01, in which he asked for written apologies from the Office for the fact that part of his salary for June 2001 had been withheld in connection with a collective blocking action, a deduction which was eventually refunded when the action was over. He also sought written guarantees that no further deductions of that kind would be made from his salary, failing which, since there was no certainty that his salary would be paid, he declared that he could not go on working at the EPO.

Circular No. 271 of 12 June 2002 harmonised the treatment of professional experience gained while preparing a doctorate by crediting such training at the rate of 75 per cent. The complainant, however, who had meanwhile resigned, was unable to benefit from the new measure. In a letter of 9 July 2003 he wrote that he considered this position as illegal in view of the principles regarding equal treatment and non-discrimination between citizens of the European Union. He added that on account of the discrimination arising from the incorrect assessment of his professional experience, he had been paid less than his colleagues in the same situation, that this discrimination was one of the main reasons why he had resigned and that he reserved the right to claim compensation.

In a letter of 8 September 2003 the Director of Personnel informed the complainant that the President of the Office, after re-examining his request for his professional experience to be credited at the rate of 75 per cent, had decided exceptionally that his request would be granted and that he would receive the sum of 2,900.35 euros in salary arrears plus interest at the annual rate of 8 per cent. In an e-mail dated 16 September 2003, the complainant contested the detailed calculation which the Office had sent him that same day. In his view, the additional period of professional experience should have been 13 months and not nine as stated, while his salary increase should also have covered the period between his promotion and his separation from service, and he should have been promoted 13 months earlier.

It appears from the opinion issued by the Appeals Committee on 30 October 2003 concerning the complainant's first appeal that the latter requested, in addition to the reimbursement of his costs, a decision from the Office on these matters, that the representative of the Office assured him that a decision would be taken, and that the Committee unanimously recommended accepting his claim for costs incurred until the time of the decision of 8 September 2003.

In another opinion of 30 October 2003, the Committee unanimously recommended that the second appeal be dismissed as unfounded. By a letter of 10 November the Principal Director of Personnel informed the complainant

that the President had decided, in accordance with the Committee's recommendation, to reject the appeal.

Having been informed by letter of 23 December 2003 of the President's decision to award him 1,000 euros to cover the legal costs of his first appeal, the complainant wrote on 6 January 2004 that he was still awaiting a final decision by the Office. In a letter of 15 January he received confirmation that the calculations relating to the additional period of reckonable professional experience and to the sum paid for salary arrears plus interest were accurate. It was added that his promotion to grade A3 had been "correctly calculated", that he would indeed be receiving 1,000 euros in costs, but that he would not be paid any damages. He contested the Office's calculations in a letter of 4 February 2004, in which he also asked to be reinstated at the EPO or, failing that, to be paid compensation equivalent to at least four annual salaries for all the damages that resulted from the Office's non-compliance with the principle of equal treatment. By e-mail of 16 February 2004 he received confirmation of what he had been told earlier and was informed that his requests for reinstatement or compensation were rejected.

On 6 April 2004 the complainant filed a third appeal, which was registered under No. 16/04. He requested that the Office credit him with an additional five months of professional experience and reconsider the date of his promotion. He also wanted the Office to acknowledge, firstly, that his initial appeal had been allowed as an attempt to remedy the nationality-related discrimination resulting from the previous method of calculating reckonable years of experience for doctorate studies, secondly, that the deduction from his salary was a consequence of the discrimination practised by the Office and, thirdly, that his resignation had been due to the discrimination he was subjected to and to the deduction from his salary. He claimed reinstatement, once the problems had been settled, or failing that an award of compensation. In a letter of 10 May 2004 he was informed that since the purpose of his third appeal was to have the files concerning his previous appeals reopened and re-examined, the President had decided not to consult the Appeals Committee and to reject the appeal definitively as manifestly irreceivable. That is the impugned decision.

B. The complainant contends that his third appeal concerns matters which had never been raised previously or which stem from the fact that his first appeal was allowed by the President of the Office, and he denies having tried to have his earlier appeals reopened or re-examined. He also considers that only one language, chosen by the staff member, should be used in the course of proceedings, that the nationalities of members of the Appeals Committee should be more diversified and that staff members should have access to as much data as possible, such as the nationalities of Committee members.

The complainant requests that his third appeal be "accepted" by the Office so that it can be examined by the Appeals Committee.

C. The Organisation contends for its main plea that the complaint is devoid of merit and subsidiarily asks the Tribunal to give a ruling on the merits of the case rather than refer it back to the Appeals Committee. With regard to the accusation of discrimination on the ground of nationality, it considers that the complainant has already expounded his point of view on this issue before the Appeals Committee in connection with his earlier appeals. In its opinion on the complainant's first appeal, the Committee saw no reason to give an opinion on the lawfulness of the calculation since the complainant's request for a review of his reckonable experience had been granted; in its opinion on the second appeal, it found it difficult to believe that the complainant's resignation had been due to a feeling of discrimination or to the deduction from his salary. His latest appeal, which was partly aimed at reopening the earlier appeals, was therefore manifestly irreceivable.

The defendant submits that its calculations are correct. It argues that the complainant's request for an additional five-month period to be taken into account in calculating the professional experience acquired during the preparation of his doctorate is irreceivable because, prior to September 2003, the complainant had never contested the failure to include this five-month period in the initial 1998 calculation. The request is also devoid of merit since he was not enrolled at university during the five months in question and he did not provide any valid evidence that he had actually used the time to prepare his doctorate. With regard to the date of his promotion, the Organisation recalls that Article 49(7) of the Service Regulations for Permanent Employees of the Office stipulates that a condition for promotion is that staff members must have served for two years in their current grade. Since the complainant has already mistakenly received a promotion before the expiry of that period, he cannot now ask for the promotion to be backdated.

The Organisation considers that it has honoured the undertaking it gave before the Appeals Committee, since a new decision was taken on 15 January 2004, confirming that of 8 September 2003. The Office considers, moreover, that

the complainant's request for it to acknowledge that it allowed his first appeal because he had been exposed to discrimination on the ground of his nationality is devoid of merit since there was no discrimination whatsoever, let alone any discrimination based on nationality. Staff members who had not signed an employment contract while preparing their doctorate were not in the same situation as those who had. Furthermore, since some staff members – including the complainant – had prepared their doctorate abroad, the assessment of their experience did not depend on their nationality. The Organisation maintains that the complainant's first appeal was ultimately allowed as a favour in order to put an end to the appeal proceedings he had instituted, as the sums involved were far smaller than the cost of the proceedings. It adds that the nationality of the members of the Appeals Committee is irrelevant since they are completely independent in the execution of their task.

The defendant is opposed to the reinstatement of the complainant, on the grounds that he was not forced to resign and that he has only himself to blame if he now regrets his decision to do so. With regard to the language used in proceedings, it points out that it is at liberty to choose any of the three official languages for the purposes of an internal appeal, but that in proceedings before the Tribunal it has to write either in English or in French at the choice of the complainant.

D. In his rejoinder the complainant accuses the Organisation of judging his case “a priori” and refusing to discuss the issues raised during the internal appeal. According to him, neither the issue of the EPO's calculations nor that of discrimination on the ground of nationality has ever been discussed. He wonders why in an organisation with 20 or more nationalities the Appeals Committee is made up of five members representing only two or three nationalities, which are precisely those he alleges are privileged in the EPO. He maintains his claim for his third appeal to be heard by the Committee and requests that the latter should not consist only of German, Dutch and Austrian nationals, that all relevant data he might request and any audio recordings of the Committee's proceedings be made available to him and that all documents concerning this appeal be drafted in English.

E. In its surrejoinder the Organisation maintains its position. It points out that when the complainant's first two appeals were heard, the members of the Appeals Committee were German, Belgian, Swedish and Swiss nationals and that they are now Belgian, French, Swedish and Swiss nationals. The complainant cannot ask for a change in the composition of the Committee, whose members are appointed in accordance with the procedure set out in Article 110(4) of the Service Regulations. The EPO submits, moreover, that since it has three official languages it cannot be obliged to use only English if the case is referred back to the Appeals Committee. With regard to the tape recordings of the hearings for the first two appeals, the defendant makes it clear that if they still exist they are intended purely for the Appeals Committee's own needs.

## CONSIDERATIONS

1. The complainant is a former staff member of the European Patent Office of Portuguese nationality, who after being recruited as an examiner at grade A2 on 1 September 1998 and being promoted to grade A3 on 1 July 2000, resigned as from 31 December 2001.
2. Prior to resigning, the complainant had filed two internal appeals registered under Nos. 49/01 and 67/01.
3. In his appeal No. 49/01 filed on 18 May 2001, he challenged the fact that when he was recruited the years he had spent preparing his doctorate had been credited by the Office as “professional activity” on a 50 per cent basis instead of a 75 per cent basis. He was first told that the issue of recognition of the experience acquired preparing a doctorate was being considered but that no decision would be taken before June 2002. On 12 June 2002 Circular No. 271 harmonised the way in which the reckonable experience gained from doctorate studies is taken into account by crediting all training periods at 75 per cent up to a maximum of 36 months. The Administration initially refused to allow the complainant the benefit of this reform but eventually agreed, in a letter of 8 September 2003, that the period 1 January 1991 to 31 December 1993 should “exceptionally” be treated as professional activity and that his position at 1 September 1998 would be “adjusted” so that he would be considered as having been recruited at grade A2, step 3, with 11 months' service within that step. It was added that he would be paid the sum of 2,900.35 euros including interest as a result of the reconstitution of his career.
4. After hearing the complainant and his representative, who contended that the former had suffered unfair and discriminatory treatment, the Appeals Committee issued its opinion on 30 October 2003. It found that the letter of 8 September 2003 had made the appellant's original request void of substance in that it had granted his request

for the period of his doctorate to be credited at 75 per cent and that there was no reason to give an opinion on the lawfulness of the original calculation made. The Committee recommended that the complainant be reimbursed for costs incurred until the time of the decision of 8 September 2003 and expressed the view that the issues raised in connection with the implementation of that decision, in particular regarding calculation of the complainant's salary entitlements, fell outside the scope of the original appeal and that a new appealable decision had to be taken in that respect, as promised by the Office at the hearing. On 23 December 2003 the Principal Director of Personnel informed the complainant that, as his appeal had been allowed by the decision of 8 September 2003, the President of the Office had decided to award him 1,000 euros to cover legal costs. The complainant having protested again, the Organisation informed him on 15 January 2004 of the reasons why it considered that his years of experience had been correctly calculated; it stated that the date of his promotion to grade A3 should not be modified and explained how the outstanding arrears on his salary had been calculated. On 4 February 2004 the complainant wrote expressing disagreement with these calculations, on the grounds that a period of five months during which he had prepared his doctorate while working for FADO should have been taken into account and that he should have been promoted to grade A3 thirteen months earlier. He asked to be reinstated in the EPO or to be paid compensation for the damage caused by the Office's discriminatory attitude, which had led to his resignation.

5. In his appeal No. 67/01 filed on 18 September 2001, the complainant protested against the fact that part of his salary for the month of June had been deducted in connection with a collective action; he asked for written apologies from the Office and a guarantee that no further withholding of that kind would occur, failing which he could not go on working at the EPO and would seek compensation for the damage he had incurred.

On 30 October 2003 the Appeals Committee recommended that his claims be dismissed; this opinion was endorsed by the President and the complainant was informed of that decision by letter of 10 November 2003.

6. On 6 April 2004 the complainant filed a third appeal, registered later on under No. 16/04, which was rejected by the President as manifestly irreceivable in a decision notified on 10 May 2004. This is the decision that has given rise to the complaint.

7. In that third appeal the complainant put forward several claims. He requested that an additional five months be taken into account for the calculation of his experience prior to joining the Office and that the date of his promotion to grade A3 be reconsidered, that it be acknowledged that the Office had allowed his appeal No. 49/01 not as a favour but in order to remedy nationality-related discrimination resulting from the previous system used to evaluate doctorate experience, that it be admitted that the deduction from his salary was due to discriminatory acts by the Office, that it be acknowledged also that his resignation was due to the discrimination he was subjected to and to the salary deduction he had complained of. Lastly, he asked that a decision be taken either to reinstate him or to compensate him once the discrimination issues were solved.

8. It appears from the decision of 10 May 2004 that the President interpreted that appeal as a request for the files concerning the two previous appeals to be "reopened and re-examined", even though both appeals had led to a final decision which could be challenged only before the Tribunal. Since the third appeal was therefore regarded as manifestly irreceivable, the President "concluded that, to avoid unnecessary proceedings, it [was] unnecessary to seek the opinion of the Appeals Committee and that [the] appeal [should] be considered definitively rejected".

9. In his complaint the complainant merely asks for the case to be sent back to the Appeals Committee, which should be made up of members of different nationalities and should allow only one language to be used in the course of proceedings. The defendant for its part reiterates that the new appeal was manifestly irreceivable since it attempted to challenge decisions already taken after consultation of the Appeals Committee. Subsidiarily, it asks the Tribunal to rule on the merits of the complaint directly, without referring the case back to the Appeals Committee.

10. The Tribunal agrees with the defendant that on many points the complainant merely repeats arguments which he put forward before the Appeals Committee. These include his pleas regarding the discrimination he supposedly suffered on account of his nationality, the circumstances in which he resigned, the injury he suffered owing to the deduction from his salary – which was in fact cancelled – and his claim for reinstatement or compensation. The Office was right to refuse to refer again to the Appeals Committee matters which the latter had already dealt with. And the Tribunal sees no reason to rule directly on those claims, which appear manifestly unfounded, particularly given that this has not been requested by the complainant.

11. However, it is true that the Appeals Committee had expressly reserved its opinion on the issue of how the complainant's salary had been calculated pursuant to the Office's decision of 8 September 2003, and had stated that a new appealable decision should be taken in that respect, as promised by the Office at the hearings. That decision was duly taken, as noted above, on 15 January 2004, and insofar as the complainant asks, in his appeal, for the calculation of reckonable experience for his initial level of recruitment and the date of his promotion to grade A3 to be reconsidered, the defendant cannot validly object that the issue has already been referred to the Appeals Committee. The Tribunal cannot settle the matter directly without the appeal having been considered on this point, as is the rule, by the body responsible for issuing recommendations in the course of internal appeal proceedings.

12. While the complainant's other claims and pleas, particularly for the disclosure of documents and for recommendations to be made to the defendant, must be rejected, the complainant is nevertheless entitled to have his case referred back to the Organisation for consideration of his appeal filed on 6 April 2004 regarding the calculation of reckonable experience for the purposes of establishing his initial level of recruitment and the date of his promotion to grade A3. He is entitled to an award of partial costs, which the Tribunal sets at 500 euros.

## DECISION

For the above reasons,

1. The case is referred back to the EPO for consideration of the claims of the appeal filed on 6 April 2004 described in this judgment under 12.
2. The Organisation shall pay the complainant 500 euros in costs.
3. All other claims are dismissed.

In witness of this judgment, adopted on 5 May 2005, 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 6 July 2005.

Michel Gentot

Seydou Ba

Claude Rouiller

Catherine Comtet