

The Administrative Tribunal,

Considering the complaint filed by Mr H.S.A. D. against the European Patent Organisation (EPO) on 15 June 2006, the Organisation's reply of 29 September, the complainant's rejoinder of 9 December 2006 and the EPO's surrejoinder of 22 March 2007;

Considering the applications to intervene filed by:

G. A.	C. L.
L.V. B.	S. L.-T.
T.P. B.	E. L.
R. B.	C. M.
F. B.	W. M.
B. C.	T.G.R. M.
P. C.	M. M.
P.A. C.	Y. P.
M.A. D.	T. P.
S.J.P. d. J.	L.E.L. P.
H.J. D.	M. R.
K. D.	A. R.
A.W.M. D.	M. S.
P. F.	A. S.
C.D.J. F.	T.S. S.
A.M. F.	J. S.
P. F.	J.-E. S.
S. G.	M. S.
C. G.	R. v. d. Z.
M. G.	A. v. W.
T.M. G.	K.A. V.
P. H.	P.H.W. V.

R. I.	L.M. V.
S. I.	K. V.
J.-M. J.	V. V.
K.S. J.	J.F.M. W.
H. K.	J.G. W.
R. K.	H. W.
M. K.	J.W. Y.
T.R. K.	F. Z.
H.-C. K.	

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 German national born in 1962, entered the service of the European Patent Office – the EPO’s secretariat – on 1 February 1991 as an examiner at grade A2. He was promoted to grade A3 on 1 December 1994 and to grade A4 with effect from 1 June 2005.

Pursuant to Administrative Council decision CA/D 4/96 of 8 March 1996, two new steps – referred to as “negative steps” – were added to the basic salary scales at the beginning of each grade; thus, with effect from 1 January 1996, the steps were numbered -1 to 11. It was decided that these two new steps would not apply to staff members already holding a post at the Office on 8 March 1996. By decision CA/D 14/01 the Administrative Council approved a proposal to renumber the steps from 1 to 13 as of 1 July 2001.

On 7 June 2002 the Administrative Council adopted decision CA/D 8/02, amending salary scales and certain provisions of the Service Regulations for Permanent Employees of the European Patent Office to permit a restructuring of the career system for staff in category A. Article 7 of this decision introduced a transitional measure and was worded as follows:

“With effect from 1 January 2002 – but at the earliest as from the date on which they took up their duties – a 12-month exceptional advancement shall be granted to staff graded in A3 on 31 December 2001 or recruited in that grade after 31 December 2001 and who, on the date they entered grade A3, would have been graded more favourably according to the new scale structure or the new criteria for step-and-grade assignment on recruitment. This exceptional advancement shall not affect the experience to be taken into account for the purposes of subsequent promotions.”

In July 2002 this exceptional advancement was granted to a first group of staff members who were deemed to meet the requirements of Article 7. By a note of 18 December 2002 the Vice-President in charge of Administration announced that a second group of staff members – those who joined the EPO with eight years’ reckonable experience and who, on recruitment, were assigned to grade A3, step -1 (or equivalent following the renumbering of the steps) – would also be granted the above-mentioned advancement.

At the end of February 2003 the complainant learnt that a number of his colleagues who, like he, had been recruited before 8 March 1996 and who held grade A3 on 31 December 2001, had also been granted the exceptional advancement with effect from 1 January 2002. By letter of 16 April 2003 he requested this advancement and stated that, should his request be rejected, his letter was to be treated as an internal appeal. The President of the Office considered that under the terms of decision CA/D 8/02 he was ineligible for such advancement and the matter was referred to the Appeals Committee.

Forty-two other examiners also filed internal appeals. The appeals were divided into two groups: group A comprised the appeals of the complainant and of 39 other examiners, whilst group B comprised the appeals of three examiners who had already been promoted to grade A4 by 31 December 2001. In its opinion of 13 March 2006 the Committee recommended that the appeals be dismissed. By a letter of 5 April 2006, which constitutes the impugned decision, the Director of Personnel Management and Systems notified the complainant that his appeal had been rejected as unfounded.

B. Relying on Judgment 2313, the complainant contends that the principle of equal treatment has been breached. He explains that the group of colleagues recruited prior to 8 March 1996 who were granted the exceptional advancement were selected on the basis of the grade and step they held when they were promoted from A2 to A3: those who were on step 9 or higher of grade A2 and whose overall rating in their staff report was “good” were granted the advancement, whereas those who, like he, were on step 8 or 7 – with an overall rating of “very good” or “excellent” respectively – were not promoted. The complainant recognises that although he was in the same legal position as his colleagues, he was not in the same factual situation. Nevertheless, in his opinion, this difference does not warrant different treatment. In his view, the fact that, by the time he received his promotion to grade A3, he had acquired more seniority through merit but less in terms of years of service than that group of colleagues should be immaterial. The complainant emphasises that the granting of exceptional advancement has upset the ranking of each staff member according to seniority. Lastly, he observes that the impugned decision adversely affects not only his salary, but also his allowances and pension rights.

The complainant requests the quashing of the impugned decision, the granting of the 12-month exceptional advancement with retroactive effect from 1 January 2002, payment of interest on “outstanding amounts” and 5,000 euros in costs.

C. In its reply the EPO submits that the complainant’s internal appeal was irreceivable for want of a cause of action and that consequently his complaint is also irreceivable. It considers that the new structure of the salary scales has had no impact on the complainant’s position and that he has therefore not been injured by the fact that he was not granted exceptional advancement.

On the merits the Organisation explains that the purpose of the transitional measure was to provide advancement for staff members who, under the new career system, would have been assigned to a higher step in grade A3 on recruitment or promotion to this grade. When the President of the Office decided to extend this measure to staff members recruited before 8 March 1996 and promoted to grade A3 from grade A2, step 9 or higher he exercised his discretion, which was limited only insofar as the Administrative Council had defined the group of persons qualifying for exceptional advancement. Since the granting of the advancement was conditional upon the fact that the staff members in question would have been assigned to a higher step in grade A3 under the new system, and since the complainant would not have been placed on a higher step on promotion to grade A3, the refusal to grant him exceptional advancement was well founded and was not taken *ultra vires*. The EPO adds that, as noted by the Appeals Committee, under the new career system for category A staff outlined in Circular No. 271, staff members whose overall rating was “very good” or “excellent” had a better chance of obtaining early promotion to grade A4 than their colleagues who had been promoted from grade A2, step 9 or above and whose staff reports contained a lower rating.

D. In his rejoinder the complainant refers to Judgment 294 and states that he does have a cause of action because he has been “less well treated than others”.

He reiterates his arguments on the merits. He explains that he has suffered injury in that his situation has deteriorated compared with the group of colleagues recruited prior to 8 March 1996 who were granted exceptional advancement. Again relying on Judgment 294, he submits that the President of the Office has the power and the duty to remedy such unequal treatment and he disputes the defendant’s view of the limits to which the President’s discretion was subject. He adds that the staff report which earned him his more rapid promotion to grade A3 had no bearing on his promotion to grade A4.

E. The EPO maintains its position in its surrejoinder. It adds that insofar as the interveners have the same claims as the complainant and seek the same redress on the strength of the same pleas, they are entitled to intervene in the proceedings provided that their factual and legal position is identical, or at least similar, to that of the complainant. Given that appellants belonging to group B were not covered by the terms of decision CA/D 8/02, the interests of these staff members have not been harmed and they had no cause to lodge an appeal.

## CONSIDERATIONS

1. On 8 March 1996 the EPO's Administrative Council decided to amend both the procedure for adjusting remuneration laid down in the implementing rule for Article 64 of the Service Regulations and salary scales. Thus, with effect from 1 January 1996 two new steps numbered -1 and 0 were added to the basic salary scales at the beginning of each grade. On 28 June 2001 the Administrative Council decided that the steps would be numbered from 1 to 13, instead of from -1 to 11, as of 1 July 2001.

In 2001 consideration was given to revising the procedure for adjusting remuneration introduced in 1996 and to redefining the career structure for category A staff. On 7 June 2002 the Administrative Council adopted decision CA/D 8/02 amending salary scales. Article 7 of this decision, entitled "Transitional measure", is reproduced under A, above.

On 18 December 2002, in response to comments from the staff representatives, the Vice-President in charge of Administration sent a note to all staff, which read as follows:

"Last June, the Administrative Council approved a new career system for category A staff [...], including a transitional measure granting a 12-month exceptional advancement in step for certain staff graded in A3.

The staff representatives have drawn the Office's attention to the special situation of staff who joined the EPO with 8 years' reckonable experience and on recruitment were graded A3 step -1 (or equivalent following the renumbering of the steps). Initially, these staff did not benefit from the transitional measure.

Following detailed study of this complex matter, the Office has concluded that this group of staff would have been treated more favourably under the new A-career rules, and can therefore be granted the 12-month exceptional advancement.

[...]"

2. In February 2003 the complainant learnt from colleagues that a number of staff members who, like he, had been recruited before 8 March 1996 and who held grade A3 on 31 December 2001, had also obtained the 12-month exceptional advancement with effect from 1 January 2002. Having not been granted such advancement, on 16 April 2003 he sent a letter to the President of the Office in which he requested exceptional advancement. The Appeals Committee, to which the matter was referred, issued its opinion on 13 March 2006; it found that the appeal was admissible but unanimously recommended its dismissal. By a letter of 5 April 2006, which constitutes the impugned decision, the complainant was informed that the President of the Office had rejected his appeal.

### *Receivability*

3. The Organisation objects to the receivability of the complaint on the grounds that the internal appeal was irreceivable for want of a cause of action.

On this point the Tribunal concurs with the Appeals Committee that since the complainant did not obtain the 12-month exceptional advancement – unlike some of his colleagues recruited before 8 March 1996 and who held grade A3 on 31 December 2001 – he was excluded from the application of a measure which could confer direct financial benefits. He therefore had a cause of action in that he wished to be reinstated in what he deemed to be his rights. Whether he was right or wrong is a question which concerns the merits of the case.

### *The merits of the complaint*

4. The complainant contends that the principle of equal treatment has been breached in that he was denied the 12-month exceptional advancement which was granted to some colleagues who had the same grade as he did on 31 December 2001 and who, like he, had been recruited before 8 March 1996.

Relying on Judgment 2313, he contends that his situation in law was identical to that of the afore-mentioned colleagues, and that although the factual situations were different – to the extent that he had been promoted from grade A2, step 8, to grade A3 on the strength of an overall rating of "very good" in his staff report whereas the

colleagues in question were at grade A2, step 9, and had an overall rating of “good” when they were promoted to grade A3 – this difference does not warrant different treatment. He draws attention to the fact that in the Service Regulations no distinction is drawn between seniority acquired through merit and seniority acquired through length of service. He submits that even if the Organisation and the Appeals Committee consider that there is a notable difference in factual situations, neither furnishes a cogent argument for severing the link between seniority and the assignment of a grade and step.

5. The Organisation submits that the complaint is unfounded.

It observes that Article 7 of decision CA/D 8/02 establishes two conditions for granting exceptional advancement to a staff member recruited before 1 January 2002:

- (a) that the staff member was graded A3 on 31 December 2001, and
- (b) that the staff member would have been graded more favourably on the date he/she entered grade A3 had the new salary scales structure or the new criteria for step-and-grade assignment on recruitment been applied to him.

Thus, it appears that this transitional measure was introduced in order to avoid penalising, with respect to their career development, those staff members who, under the new rules, would have been assigned to a higher step in grade A3 on recruitment or promotion to that grade.

The Organisation states that the President of the Office, acting in his capacity as appointing authority and within his competence to determine promotion policy, exercised his discretion when applying Article 7 of decision CA/D 8/02. This discretion was limited only by the Administrative Council’s definition of the group of staff members who could benefit from exceptional advancement.

The EPO considers that the President’s decision not to grant the complainant the 12-month exceptional advancement was neither unsubstantiated nor taken *ultra vires*, because the complainant would not have been assigned to a higher step upon promotion to grade A3 if this promotion had been governed by the new rules, and that the principle of equality has certainly not been violated.

6. In consideration 5 of Judgment 2313, to which the complainant refers, the Tribunal stated, with respect to the principle of equality:

“The principle of equality requires that persons in like situations be treated alike and that persons in relevantly different situations be treated differently. In most cases involving allegations of unequal treatment, the critical question is whether there is a relevant difference warranting the different treatment involved. Even where there is a relevant difference, different treatment may breach the principle of equality if the different treatment is not appropriate and adapted to that difference.”

7. In the instant case it is not disputed that the President of the Office exercised his discretion when he included among the group of staff members receiving the 12-month exceptional advancement those who had been recruited before 8 March 1996 and who met two conditions, namely that they held grade A3 on 31 December 2001 and that they would have been assigned to a higher step if the new A-career rules had been applied to them.

The Tribunal considers that although the complainant meets the first of the above-mentioned conditions, he does not meet the second. While he was recruited prior to 8 March 1996 and was in grade A3 on 31 December 2001, he does not produce, or offer to produce, proof that he would have been assigned to a higher step under the new rules.

The question is therefore whether, in the light of the case law cited above, this fact could justify a difference in treatment between the complainant and his colleagues who, like he, were recruited before 8 March 1996 and were in grade A3 on 31 December 2001.

In order to answer this question, it is necessary to bear in mind the Administrative Council’s aim in introducing the transitional measure provided for in Article 7 of decision CA/D 8/02, which was to avoid penalising staff members who would have been placed on a higher step if they had entered grade A3 under the new rules. The evidence shows that the staff members recruited before 8 March 1996 who were granted exceptional advancement were those who had proceeded from grade A2, step 9, to grade A3 on the strength of their length of service and who would therefore have been assigned to a higher step under the new rules, whereas the complainant, who was promoted

from grade A2, step 8, to grade A3 on merit, was not in this situation. It follows that, given the aim of the measure, the complainant could not be included among the group receiving such advancement, that the difference in treatment was perfectly justified and that it was appropriate and adapted to the situation.

8. The plea that the Organisation drew a distinction between promotion based on merit and promotion based on length of service, which is not provided for in the Service Regulations and which results in discriminatory treatment, is irrelevant. As the Appeals Committee noted, it has been established that staff members – including the complainant – whose performance rating was higher had a better chance of obtaining early promotion to grade A4 than staff members who had been promoted from A2 to A3 solely on the strength of their length of service.

9. It may be concluded from the above that the plea concerning a breach of the principle of equal treatment is unfounded. The complaint must therefore be dismissed, as must the applications to intervene.

## DECISION

For the above reasons,

The complaint and the applications to intervene are dismissed.

In witness of this judgment, adopted on 4 May 2007, Mr Michel Gentot, President of the Tribunal, Mr Seydou Ba, Vice-President, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Seydou Ba

Agustín Gordillo

Catherine Comtet