

106th Session

Judgment No. 2775

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr H. B. against the European Patent Organisation (EPO) on 4 June 2007 and corrected on 9 August, the EPO's reply of 20 November 2007, the complainant's rejoinder of 23 January 2008, corrected on 23 February, and the Organisation's surrejoinder of 16 May 2008;

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 1942, joined the European Patent Office – the secretariat of the EPO – on 1 July 1980 as a senior formalities officer at grade B5. He retired on 1 July 2007.

In 1990 the President of the Office submitted to the Administrative Council document CA/7/90 in which he proposed to change the way in which category B and C posts were presented in the annual budget in order to permit greater flexibility in the deployment of staff and to offer a more structured career perspective to the staff

members concerned. The main feature of this proposal was to group together certain grades in categories B and C from 1991 onwards. Thus B-category posts were assigned to one of three grade groups: B1-B4, B3-B5 or B4-B6. The latter group included only programmers. According to point 11 of document CA/7/90, a transitional problem was foreseen concerning staff members recruited during the build-up period at grade B5 who, in the absence of available posts, might have to spend the remainder of their career without promotion. The document therefore provided that “[f]or the most deserving of these, the President may accordingly recommend the temporary provision of higher grade posts on a case by case basis when presenting the annual draft Budget”. This provision is sometimes referred to as the “hardship provision”. Staff were informed of the adoption of the President’s proposal introducing the new career system by Circular No. 200 of 22 February 1991.

By a letter of 28 February 1991 the complainant was notified that pursuant to Circular No. 200, he had been placed in grade group B3-B5. In May 1991 he objected to that classification and asked to benefit from the hardship provision. Alternatively, he requested that all formalities officers be classified in grade group B4-B6. The following month he was informed that these requests could not be granted, but that the President fully intended to apply the hardship provision to deserving cases. The complainant wrote again to the Administration in June 1995, asking to be promoted to grade B6. He alleged that following the introduction of the new career system he had less chance of reaching grade B6. In September 1995 he was informed that the President gave consideration to the matter each year, but that it was considered too early for him to benefit from the hardship provision.

Further changes to the career system were introduced by Administrative Council decision CA/D 11/98 of 10 December 1998. Pursuant to that decision the Office established, as from 1 January 1999, a new career system in which the grade groups in category B were reduced from three to two. A new grade group B5-B1 was

created, combining the former grade groups B1-B4 and B3-B5, which had previously overlapped. In addition, grade group B4-B6* was expanded to include employees other than programmers. Circular No. 253 of 21 December 1998, which entered into force on 1 January 1999, provides guidelines for the implementation of the new career system for categories B and C.

On 9 May 2003 the complainant applied for the post of Supervisor/Head of Section, which belonged to grade group B4-B6. On 6 November the Promotion Board recommended, after having interviewed candidates, that he be promoted to the vacant position with effect from 1 June 2003. The complainant was informed, by letter of 26 November, that the President had decided to promote him to that position with effect from 1 December 2003.

On 24 February 2004 the complainant filed an internal appeal asking the President to backdate his promotion to a date corresponding to the average time frame for promotion to grade B6 within grade group B4-B6 under the current career system. Alternatively, he requested that his promotion be backdated to the date he turned 55, or to the closing date for applications for the post to which he was appointed, i.e. 23 May 2003, or to 1 July 2003, the anniversary of his recruitment. He was informed, by a letter of 23 May 2005, that the matter had been referred to the Internal Appeals Committee since the President had considered that his request could not be granted.

In its opinion of 27 December 2006 the Committee noted that the President had decided to move the promotion date proposed by the Promotion Board by six months to the complainant's detriment without giving reasons. Moreover, he had not taken into account the Board's findings that the complainant largely met the formal criteria for promotions and that he had been exercising the duties of the vacant post for some time. Having carefully examined the complainant's career and record of performance, the Committee found that he undoubtedly met the criteria for promotion with effect from

* These grade groups are also referred to as B4/B1, B5/B1 and B6/B4, respectively.

1 June 2003 in terms of both merit and seniority. It thus considered that the President's decision had overlooked essential facts. It recommended that the appeal be allowed insofar as it concerned the backdating of the complainant's promotion to 1 June 2003, and that he be compensated in an amount equivalent to the arrears of salary plus appropriate interest. However, it recommended that all the complainant's other claims be dismissed as irreceivable or unfounded, in particular his claims that his promotion should have taken place much earlier under either the hardship provision, or the earlier age-55 rule, according to which a staff member holding a B grade and who had not yet been promoted could be promoted *ad personam* on reaching the age of 55 if his or her performance report were at least "good". In this regard the Committee observed that he had not initiated formal proceedings against the express or implicit rejection of the requests he had made in the 1990s concerning the classification of his post. In its view, allowing the complainant to challenge the rejection of those requests by means of the appeal filed in February 2004 would constitute "circumvention of the time limit for appeal" of three months set out in Article 108 of the Service Regulations for Permanent Employees of the European Patent Office. It also recalled that the age-55 rule had been abolished with the entry into force of Circular No. 253.

By a letter of 28 February 2007 the Director of Personnel Management and Systems informed the complainant that the President had decided to endorse the Committee's unanimous recommendations. That is the impugned decision.

B. The complainant submits that he should have been promoted to grade B6 earlier under the hardship provision. According to him, this provision was not abolished by the introduction of the new career system in January 1999. Moreover, Communiqué No. 24 of 27 January 1998 provided that staff members would not suffer any disadvantages due to the introduction of the new career system. He alleges that if the hardship provision had been repealed he would

have suffered a serious disadvantage, since the possibility of being promoted to grade B6 on the grounds of seniority and merit would no longer have existed; consequently, that provision could not have been repealed.

According to the complainant, the criteria for promotion under the hardship provision have never been published and the Office did not provide him with that information when he asked for it. Such lack of transparency is not acceptable as it may allow abuse of authority. He also contends that his work was under-evaluated and that he was not treated fairly. In support of his contention he points to the findings of an external body convened in 2004 to examine the B-category posts, which showed that his initial post should have been placed in grade group B4-B6.

The complainant requests that the Tribunal set aside the impugned decision and order the Office to re-examine his entitlement to promotion in the light of the criteria established for promotion under the hardship provision. Alternatively, if such criteria do not exist, he asks that his entitlement to promotion be re-examined in the light of the criteria applicable to promotion from B5 to B6 within grade group B4-B6. In addition, he seeks 10,000 euros in moral damages and 1,000 euros in costs.

C. In its reply the EPO contends that the complaint is time-barred and hence irreceivable insofar as the complainant relies on the hardship provision in claiming that he should have been promoted earlier to grade B6. It points out that he did not initiate formal proceedings until February 2004, by which time document CA/7/90 and Circular No. 200 were no longer in force. It stresses that, in accordance with the Tribunal's case law, the complainant may not rely on the provisions of a circular which does not apply to him. In addition, the defendant draws attention to the Internal Appeals Committee's finding that the complainant's claim that he should have been promoted to grade B6 much earlier on the basis of the age-55 rule was also time-barred.

The Organisation explains that Circular No. 253, which lays down the requirements to obtain a B6 post, superseded Circular No. 200 on 1 January 1999. It asserts that the complainant's promotion to grade B6 was assessed against the requirements of Circular No. 253 and that the criteria laid down therein were correctly applied. It consequently rejects the complainant's allegation that the Office abused its authority in refusing to provide him with information concerning the criteria applicable to promotion on the basis of the hardship provision.

The defendant stresses that decisions concerning promotion are discretionary. It adds that it has fulfilled its duty of care by deciding to follow the Internal Appeals Committee's recommendation to backdate the complainant's promotion to 1 June 2003.

D. In his rejoinder the complainant maintains that his complaint is receivable and presses his pleas. He emphasises that it was only after 23 years of service that he was promoted and that this occurred on the basis of a competition rather than through "regular promotion". He reiterates that he was discriminated against, pointing out that other staff members did not wait as long as he did to be promoted.

He acknowledges that Circular No. 253 superseded Circular No. 200 but contends that the hardship provision was not expressly repealed. Indeed, the hardship provision was mentioned only incidentally in Circular No. 200; it was in fact introduced by document CA/7/90, to which Circular No. 253 does not expressly refer.

E. In its surrejoinder the EPO insists that the complaint is in part irreceivable. Citing the case law, it points out that those who want the Tribunal to interfere with a promotion decision must demonstrate a serious defect, which the complainant has not; it is not sufficient to assert merely that one is better qualified. It adds that, unlike the complainant, the staff members to whom he compares himself had been recruited to one of the lower grades in category B; he was consequently not in like situation to these colleagues.

CONSIDERATIONS

1. The complainant joined the European Patent Office as a senior formalities officer in 1980 at grade B5. In May 2003 he applied for the post of Supervisor/Head of Section, which belonged to grade group B4-B6. On 6 November the Promotion Board recommended that he be promoted to the vacant position with effect from 1 June 2003. He was informed on 26 November that the President had decided to promote him to that position as from 1 December 2003. He subsequently challenged that decision asking that his promotion be backdated. By a letter of 28 February 2007 he was notified that the President had decided, in accordance with the Internal Appeals Committee's unanimous recommendation, to backdate his promotion to 1 June 2003. However, he had decided to dismiss his other claims as irreceivable or unfounded, in particular his claim that his promotion should have occurred much earlier under either the hardship provision or the earlier age-55 rule. That is the decision which the complainant impugns before the Tribunal.

2. The complainant contests the non-application of the hardship provision, according to which he should have been promoted earlier. He contends that document CA/7/90 and Circular No. 200 allow promotion from grade B5 to grade B6 for those staff members who entered the Organisation at grade B5 and who were at risk of spending the rest of their career in that grade. That possibility is commonly referred to as the "hardship provision". The complainant observes that changes to the career system were introduced by Administrative Council decision CA/D 11/98 of 10 December 1998 and Circular No. 253 of 21 December 1998. These documents did not mention the hardship provision. However, Communiqué No. 24 of 27 January 1998 to which the complainant also refers, provides that with the introduction of the new career system, no staff member, employed at that moment in the Organisation would be worse off compared with her/his former situation and that the hardship provision was not abolished with the introduction of the new career system. The complainant contends that if the criteria for promotion under the

hardship provision did not exist, the Organisation should have re-examined his entitlement to promotion in the light of the criteria applicable to promotion within grade group B4-B6.

3. The Tribunal states that the complaint is unfounded and observes that neither the age-55 rule nor the hardship provision was in effect anymore. The complainant's argument to the contrary must be rejected. Neither decision CA/D 11/98 nor Circular No. 253 mentions either provision and Communiqué No. 24 provides only generically that "[i]t will be a matter of great concern to ensure that no member of staff currently employed by the Office is adversely affected by the introduction of the new career structure". More significantly, decision CA/D 11/98 and Circular No. 253 introduced a new career system and specified the precise requirements for promotion to a B6 post. The introduction of this system with its specification of the requirements for promotion to grade B6 left no room for the operation of either the hardship provision or the age-55 rule in relation to such promotions and, thus, impliedly repealed them.

4. It is also important to note that since the complainant never had any right to promotion in accordance with the hardship provision, he should have appealed the decision not to promote him within the three-month period prescribed in Article 108 of the Service Regulations. The Tribunal agrees with the opinion of the Internal Appeals Committee that the complainant is time-barred from contesting the non-application of the age-55 rule or the hardship provision.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 31 October 2008, Ms Mary G. Gaudron, Vice-President of the Tribunal, Mr Agustín Gordillo, Judge, and Mr Giuseppe Barbagallo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Mary G. Gaudron
Agustín Gordillo
Giuseppe Barbagallo
Catherine Comtet