

106th Session

Judgment No. 2777

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J.D.M.L. B. against the European Patent Organisation (EPO) on 27 July 2007, the EPO's reply of 2 November 2007, the complainant's rejoinder of 14 February 2008 and the Organisation's surrejoinder of 21 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. Facts relevant to this dispute are given in Judgment 2664, delivered on 11 July 2007. It may be recalled that by decision CA/D 4/96 of 8 March 1996 the Administrative Council introduced two additional steps, known as step -1 and step 0, at the beginning of each grade on the basic salary scales. Article 12(6) of the decision relevantly provides that “[t]hese two new steps will not apply to permanent employees and contract staff in post on the date on which this decision is approved by the Administrative Council”. These “negative steps” consequently applied only to staff members recruited after 8 March 1996. Subsequently, pursuant to the Administrative

Council's decision CA/D 8/02 of 7 June 2002, new salary scales were introduced and the rules governing the assignment of a step within grade upon recruitment or promotion were modified so as to give greater scope for advancement based on merit. In view of the fact that staff members entering grade A3 under the new rules would, in some cases, obtain a more favourable grading than staff members who had been recruited or promoted to grade A3 under the previous rules, Article 7 of decision CA/D 8/02 provided for a transitional measure, according to which a 12-month exceptional advancement would 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.

The complainant, a Belgian national born in 1968, joined the European Patent Office, the EPO's secretariat, on 1 June 2000 as an examiner at grade A2 in The Hague. In June 2003 the complainant filed a first appeal challenging the refusal to grant him a 12-month exceptional advancement as from 1 January 2002. The decision of the President of the Office to reject that appeal as unfounded was the subject of the complainant's first complaint, which the Tribunal dismissed in Judgment 2664. In the meantime the President had decided, in November 2004, to promote the complainant to grade A3, step 2, with retroactive effect from 1 June 2002.

By a letter of 21 February 2005 the complainant asked the President to grant him step 3 in grade A3 as from 1 June 2002 or otherwise treat his letter as an internal appeal. In support of his request he indicated that a staff member holding the same grade as him before his promotion, i.e. A2, step 7, and performing the same tasks, but recruited prior to 8 March 1996, would be granted step 3 on promotion to grade A3. He was informed by a letter of 14 April 2005 that the President had not acceded to his request and that the matter had therefore been referred to the Internal Appeals Committee.

In its opinion of 18 April 2007 the Committee noted that the complainant was challenging the refusal to grant him a higher step

upon promotion to grade A3. In its position paper before the Committee, the Administration objected to the admissibility of the appeal contending that the complainant's claim was similar to that put forward in his first appeal, i.e. a 12-month exceptional advancement, the only difference being the date from which he claimed the advancement. Contrary to that contention, the Committee considered that the appeal was receivable as the subject matter was different to that of the complainant's first appeal. However, it unanimously recommended that the appeal be dismissed as unfounded.

By a letter of 11 May 2007 the complainant was notified of the President's decision to endorse the Committee's recommendation to dismiss his appeal. The President did not however share the Committee's view with regard to receivability. He had rather decided to follow the Office's position that the complainant's claim was similar to that put forward in his first appeal, i.e. a 12-month exceptional advancement, the only difference being the date from which he claimed the advancement. That is the impugned decision.

B. The complainant alleges unequal treatment as a result of the application of decision CA/D 4/96. He contends that a "virtual staff member" recruited prior to 8 March 1996 but holding the same job title, grade and step and performing similar tasks to his and whose performance evaluations were identical would have been promoted from grade A2, step 7, to grade A3, step 3, since the two "negative steps" introduced by Article 12(6) of decision CA/D 4/96 did not apply to staff members recruited before 8 March 1996. He points out that footnote 2 of Article 48 of the Service Regulations for Permanent Employees of the European Patent Office also provides that the "first two steps in each grade will not apply to permanent employees and contract staff in post on the date of the decision of the Administrative Council to add these new steps (8 March 1996)". He further draws attention to the long-term financial effects of the decision to apply Article 12(6) to the "virtual staff member" and not to him. In his view, it would result in a loss of 41,528.50 euros in salary for him by the end of his professional career in June 2029 as well as a loss in pension

benefits. He consequently considers that he has been discriminated against and that the impugned decision was taken in breach of the principle of equality, which directs equal pay for work of equal value.

In addition, the complainant contends that the decision not to promote him to grade A3, step 3, contravenes Article 49(7) of the Service Regulations. This article provides that promotion to a post in the next higher grade in the same category shall be made by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and reports. The Tribunal has already ruled concerning the application of Article 49(7) that when a decision to promote a staff member is taken on the basis of considerations other than ability and record of performance, fairness and impartiality cannot be ensured. Since the decision to promote him was taken on the basis of his date of appointment, the complainant asserts that he was not promoted in a fair and impartial manner.

The complainant requests the quashing of the impugned decision. He also asks to be assigned to step 3 in grade A3 with retroactive effect from 1 June 2002 and to be paid interest on the sum he would have received had he been assigned to grade A3, step 3, as from that date. He claims moral damages and costs.

C. In its reply the EPO submits that the complaint is irreceivable. It contends that the complainant's main claim is similar to that put forward in his first complaint, the only difference being the date from which he requests to be granted exceptional advancement, i.e. 1 January 2002 in his first complaint and 1 June 2002 in the present complaint.

The Organisation argues that it is unlikely that two staff members with "perfectly identical sets of characteristics and staff reports" could be found. It consequently rejects the complainant's allegation of unequal treatment based on the comparison of his situation to that of a "virtual staff member" holding the same job title, grade and step and performing similar tasks to his and whose performance evaluations were identical. It adds that, in any event, the "virtual staff member" mentioned by the complainant was recruited prior to 8 March 1996 –

thus the “negative steps” introduced by decision CA/D 4/96 applied to him – whereas the complainant was appointed after that date; that fact alone warranted treating him differently. Moreover the “virtual staff member” who entered into service on 7 March 1996 could not have been promoted to grade A3, step 3, on 1 June 2002 since he would not have met the requirements laid down in Circular No. 271 to access grade A3, namely six to eight years’ seniority in grade A2 or eight to ten years’ experience.

The defendant denies any breach of the principle of equal pay for work of equal value pointing out that the complainant was paid the appropriate salary for an examiner with his experience, and that no other examiner recruited at the same grade and step as the complainant had been paid a higher salary.

Lastly, it recalls that staff members are not entitled to promotion at a particular date or to a particular step. Referring to the Tribunal’s case law, it points out that decisions to promote a staff member fall within the President’s discretionary authority and are therefore subject to only limited review by the Tribunal.

D. In his rejoinder the complainant asserts that his complaint is receivable since the subject matter of his first and second complaints is different. In his first complaint he asked to be granted a 12-month exceptional advancement with effect from 1 January 2002 by virtue of decision CA/D 8/02, whereas in the present one he challenges the step assigned to him upon promotion.

He questions the impartiality of the members of the Internal Appeals Committee, since three of the five members were directly appointed by the President of the Office. He also submits that the defendant has not proved that the “virtual staff member” could not possibly exist and that his allegation of unequal treatment is false. He reiterates that the date of recruitment is not a criterion to be taken into account when granting a promotion.

E. In its surrejoinder the EPO maintains its position. With regard to the impartiality of the Committee, it states that the members of the

Committee were appointed in conformity with Article 110(4) of the Service Regulations and that its recommendation was unanimous. It recalls that the burden of proof is on the complainant to show that he has suffered unequal treatment. In its view, the complainant has failed to provide evidence showing that a case such as that of the “virtual staff member” has ever occurred.

CONSIDERATIONS

1. The facts giving rise to the complainant’s second complaint are the same as those in his first complaint which led to Judgment 2664. In the present case the complainant claims unequal treatment and discrimination as a result of the application of Article 12(6) of decision CA/D 4/96. For the purpose of demonstrating unequal treatment, he prepared comparative tables of the salary he received as a staff member hired after 8 March 1996 and the salary of a “virtual staff member” with identical merits and other job-related elements but recruited before 8 March 1996. He points out that, according to this analysis, the “virtual staff member” would have been promoted from grade A2, step 7, to grade A3, step 3. However, he was only promoted from grade A2, step 7, to grade A3, step 2.

2. In his earlier complaint, the complainant contended that the application of decision CA/D 8/02 adversely affected him because a group of staff members recruited before 8 March 1996 and promoted to grade A3 was granted a 12-month exceptional advancement and he was not, even though he also held grade A3 at the time of the adoption of decision CA/D 8/02 in June 2002. He alleged that the application of decision CA/D 8/02 amounted to unequal treatment and

discrimination. The Tribunal considered that the complainant, who had been recruited after the introduction of the “negative steps”, was not entitled to a grading which corresponded to that of a staff member recruited before March 1996. It consequently found that the different treatment accorded to the complainant was based on material considerations, which justified not applying the transitional measure to him. It rejected the argument based on unequal treatment and dismissed the complaint.

3. The complainant stresses that his claim of discrimination and unequal treatment in the present case is a new claim as it arises from “[t]he application of article 12(6), second sentence, of decision CA/D 4/96” and not the application of decision CA/D 8/02 that was at issue in Judgment 2664. He maintains that decision CA/D 8/02 is irrelevant to his second complaint.

4. The Tribunal concludes that this complaint is *res judicata* and, therefore, must be dismissed. As stated in Judgment 574, under 2, the doctrine of *res judicata* is applicable where the parties, the substance of the claim and the cause of action are the same as in the prior matter (see Judgment 1263, under 4).

5. Both complaints concern the complainant’s promotion to grade A3, step 2, instead of to grade A3, step 3. In both matters, the complainant claims that he was treated unequally and suffered discrimination in comparison to staff members recruited before 8 March 1996. In the Tribunal’s opinion, the issue of the application of decision CA/D 4/96 does not constitute a new claim but instead is an additional argument in support of the complainant’s claim that he ought to have been promoted to grade A3, step 3, and ought to have been raised in the first complaint. Similarly, his submissions in relation to an alleged breach of Article 49(7) of the Service Regulations ought to have been raised in that complaint. These issues have now been overtaken by the Tribunal’s earlier decision.

6. In his rejoinder the complainant submits that the Internal Appeals Committee was not impartial because three of the five members were appointed by the President of the Office. As the complainant has failed to show how the composition of the Committee was prejudicial to a proper and independent consideration of his case, even more when the decision was unanimous, this submission is rejected.

DECISION

For the above reasons,
The complaint is dismissed.

In witness of this judgment, adopted on 7 November 2008, Mr Seydou Ba, President of the Tribunal, Mr Agustín Gordillo, Judge, and Ms Dolores M. Hansen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2009.

Seydou Ba
Agustín Gordillo
Dolores M. Hansen
Catherine Comtet