

Organisation internationale du Travail  
*Tribunal administratif*

International Labour Organization  
*Administrative Tribunal*

*Registry's translation,  
the French text alone  
being authoritative.*

**B.**  
**v.**  
**EPO**

**138th Session**

**Judgment No. 4895**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr R. B. against the European Patent Organisation (EPO) on 8 June 2020, the EPO's reply of 29 October 2020, the complainant's rejoinder of 18 November 2020 and the EPO's surrejoinder of 16 February 2021;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to hold oral proceedings, for which neither party has applied;

Considering that the facts of the case may be summed up as follows:

The complainant challenges the date of his promotion with retroactive effect and seeks promotion from an earlier date.

The complainant joined the European Patent Office, the EPO's secretariat, on 1 May 1999 as an examiner. He was promoted to grade A3 as from 1 October 2005.

By an email of 11 December 2013, the complainant was informed of the decision to promote him to grade A4, with retroactive effect, from 1 July 2013. This promotion took place under the "rapid career" promotion scheme provided for in Circular No. 271 of 12 June 2002, then in force, entitled "Guidelines for applying Articles 3(1), 11(1) and 49 of the Service Regulations for permanent employees of the European

Patent Office (ServRegs) – Implementation of the career system for Category A [in the Organization]” (hereinafter “Circular No. 271”).

On 20 December 2013 the complainant submitted a request for review of this decision, seeking to be promoted retroactively with effect from one of the following dates in order of precedence: 1 July 2011, 1 October 2011, 1 July 2012 or 1 October 2012. He also requested to be paid the corresponding salary arrears and claimed that his overall rating in the performance appraisal report for the biennium 2006-2007, one of the three performance appraisal reports taken into account when considering his request, should have been “Very good” rather than “Good”. This request for review was rejected by the President of the Office on 26 February 2014 and the complainant filed an internal appeal on 23 May 2014. On 23 November 2016 the Appeals Committee issued its opinion on this appeal.

In the light of Judgment 3785, delivered in public on 30 November 2016, rendered in a case not involving the complainant but in which the Tribunal concluded that the composition of the Organisation’s appeals committees sitting between January 2015 and November 2016 was flawed, the President did not take a final decision on the complainant’s internal appeal and decided to refer the case to a newly constituted Appeals Committee for a fresh examination. The complainant was informed of this by an email of 27 March 2017. On 29 June 2017 the EPO’s Administrative Council further adopted decision CA/D 7/17, which, inter alia, amended the provisions of the Service Regulations governing internal appeals.

By a letter of 19 November 2019, the secretariat of the Appeals Committee informed the complainant of the decision of its presiding member to handle his appeal in a written procedure and, accordingly, not to hold a hearing. The complainant was also informed, on 20 November 2019, that the opinion of the former Appeals Committee did not form part of his appeal file and, thus, was not available to the new members of the Committee.

In its opinion of 30 January 2020, the newly-composed Appeals Committee unanimously recommended that the appeal be rejected as partly irreceivable, insofar as the complainant was seeking retroactive

promotion from 2011, due to the fact that the Promotion Board for that year had all information needed to take a decision on his promotion, and as unfounded in the remainder, particularly in view of the fact that the complainant did not meet the conditions required by Circular No. 271 in terms of ratings obtained to be eligible for the requested retroactivity. The Appeals Committee, however, recommended that the complainant be awarded 550 euros for the length of the proceedings.

By a letter of 10 March 2020, which constitutes the impugned decision, the complainant was informed that Ms E.B., the Chief Corporate Policies Officer, acting by delegation of power from the President, had decided to endorse the unanimous opinion of the Appeals Committee and, accordingly, to reject his appeal as partly irreceivable and as unfounded in the remainder. The complainant was nevertheless awarded 550 euros in compensation for the length of the proceedings.

The complainant asks the Tribunal to review the impugned decision, to order his promotion to grade A4 with retroactive effect from 1 July 2011, to award him an advancement of at least two steps, or one step plus one grade and payment of arrears with interest, or, subsidiarily, to award him, in respect of material damages, a lump sum of 200,000 euros, plus the related pension entitlements. He also seeks moral damages in an amount of 10 per cent of the sum claimed for material damages, which he estimates as at least 20,000 euros (that is 1 per cent of 200,000 euros per year, over a period of 10 years from 2010). Lastly, he seeks an award of costs.

The EPO asks the Tribunal to dismiss the complaint as partly irreceivable, insofar as it seeks retroactive promotion for the complainant from 1 July 2011, and as unfounded in the remainder.

### CONSIDERATIONS

1. The complainant seeks a “review” of the decision to promote him to grade A4 with retroactive effect from 1 July 2013 and asks the Tribunal to backdate his promotion to 1 July 2011.

2. The Tribunal notes, first of all, that, as the EPO submits, it is not within the Tribunal's competence to order the promotion of an official (see Judgments 4391, consideration 12, and 4040, consideration 2).

Such a request to that effect by the complainant must, therefore, be rejected.

3. It should be recalled that the Tribunal has consistently held that international organizations enjoy wide discretion in relation to the promotion of staff and that it therefore exercises only a limited power of review in this area. The Tribunal will not interfere unless the impugned decision was taken without authority; if it was based on an error of law or fact, some material fact was overlooked, or a plainly wrong conclusion was drawn from the facts; if it was taken in breach of a rule of form or of procedure; or if there was an abuse of authority (see, in particular, Judgments 4391, consideration 4, and 4290, consideration 8). Furthermore, the Tribunal has held that, since the assessment of a candidate for promotion involves a value judgement, it is not its role to interfere in this decision-making process unless it is seriously flawed (see, in particular, Judgments 4391, consideration 4, 4290, consideration 8, 4066, consideration 3, and 1827, consideration 6).

4. In this case, the relevant provisions applicable under the Organisation's "rapid career" scheme can be summarized as follows:

- Under Article 49 of the Service Regulations for permanent and other employees of the Office ("Access to a higher grade"), in the version applicable in this case, a permanent employee may obtain a higher grade by a decision of the appointing authority, here the President of the Office, including "by promotion to the next higher grade in the same group of grades in the same category under the career system", after consultation of the Promotion Board (paragraphs 1(d) and 4(b) of Article 49), and "[p]romotion to a post in the next higher grade within a group of grades in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the

minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and at least two years' service in their grade in the Office. [...]" (paragraph 7 of the same article);

- Also under Article 49, "[t]he President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraph 7 above. The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration. The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report" (paragraph 10 of the same article);
- Moreover, Circular No. 271 of 12 June 2002, then in force, entitled "Guidelines for applying Articles 3(1), 11(1) and 49 of the Service Regulations for permanent employees of the European Patent Office (ServRegs) – Implementation of the career system for Category A [in the Organization]", provided as follows under Section III ("Obtaining a higher grade (Article 49 ServRegs)"):

"A. Promotion to grades A2, A3 and A4

Promotion to grades A3 and A4 occurs on a recommendation by the promotion board, and is based on merit and experience.

Merit

To assess merit, promotion boards draw on a staff member's performance-appraisal reports. Important aspects of merit are his aptitude and abilities and his efforts to develop these in order to meet the needs of the service and fulfil the requirements of the next higher grade.

Experience

The table below shows the number of years' experience required, depending on merit, for advancement to grades A2, A3 and A4. The 'number of years' experience' criterion is met by whichever of the following two conditions - taken separately and without reference to the other - is fulfilled first:

- (a) total experience as defined above
- (b) seniority in the grade occupied prior to promotion

Number of years experience required	Average career		Rapid career	
	Total experience	Seniority in grade	Total experience	Seniority in grade
Access to A2 (i)	2	2	2	2
Access to A3 (ii)	8 - 10	6 - 8	5 - 7	3 - 5
Access to A4 (ii)*	19 - 25	11 - 15	9 - 18	4 - 11
* For promotion to A4, no account is taken of experience acquired before the age of 25.				

[...]

- (ii) Promotion to A3 or A4 occurs at the earliest after 2 years in the grade occupied prior to promotion (Article 49(7) ServRegs).

The mid-point of the ‘average career’ band is the number of years applicable to staff whose performance has justified an unqualified overall assessment of “good”.

The promotions of staff whose performance is assessed as at least ‘good’ - overall and under the different staff-report headings - occur at the latest at the upper limit of the periods indicated for the average career and total experience.

A recommendation for promotion under the ‘rapid career’ criteria must be based on staff reports covering a period of at least two years. Thus promotion from A2 to A3, for example, may occur with 7 years’ total experience and an unqualified ‘very good’ for the previous two years, provided that any previous reports were at least unqualified ‘good’.

For promotion from A3 to A4, the staff reports to be taken into account must cover the three previous reporting exercises. The promotion board may decide to derogate from this rule in individual cases. [...];”

- The electronic appraisal form is reproduced in Annex 1 to Circular No. 246, then in force, on “General guidelines on reporting”. It included four specific sections and one section devoted to an overall assessment, each with the following rating scale: “Outstanding – Very good – Good – Less than good – Unsatisfactory”. Paragraph 6 of Section B (Preparations and filling in the form) of the circular indicated that: “The rating scale for performance in each part of the report as well as overall performance is set out in each part of the staff report form, a box

being provided for each rating. The reporting officer is asked to mark the appropriate box, indicating the rating awarded on the basis of his integrated assessment of the person reported upon. Any supplementary remarks which might assist in arriving at a comparative assessment of those staff members who have been given the same rating shall form part of the text in Parts I to V”;

- A conciliation procedure was also provided for under Section C (The procedure) of Circular No. 246, in the event that the staff member concerned disputed his assessment, failing which the performance appraisal report became final (Part X(1) of the Section). If the conciliation procedure was unsuccessful, the staff member concerned could then, under paragraph 7 of Section D (Conciliation procedure) of the Circular, continue proceedings before the Internal Appeals Committee in accordance with Articles 107 and 108 of the Service Regulations.

5. In this case and with regard to a promotion from grade A3 to grade A4, the Promotion Board met in 2013 and, in accordance with Circular No. 271, took into account the three rating reports for the biennia 2006-2007, 2008-2009 and 2010-2011.

With regard to these reports, the complainant mainly challenges the overall assessment attributed to him in the report for 2006-2007 or, at the very least, contends that this overall assessment should be interpreted differently from the way in which it was interpreted by the Promotion Board, the President of the Office and the Appeals Committee.

However, the Tribunal observes, first of all, that insofar as the complainant seeks to challenge the overall assessment in the report concerned, such a request can no longer be granted, since he did not dispute the report following the procedure provided for in the aforementioned Circular No. 246, including by filing an appeal with the Appeals Committee in due time to that effect. On the contrary, he expressly accepted the assessment following a conciliation procedure on the subject with the Organisation which led to the revision of certain partial ratings and assessments, but not the overall assessment itself.

Certainly aware of this issue of receivability, the complainant criticises, subsidiarily, the Organisation's interpretation, when it took the impugned decision, of the overall "Good" rating given to him in the performance appraisal report for 2006-2007. He refers to the aforementioned Circulars Nos. 271 and 246, from which he infers that the Organisation developed "a system that further refines 'Very good' and 'Good' into three sub-categories, not definitively codified, as follows: [on the one hand,] 'in the upper range', an 'unqualified' or straightforward rating, and, [on the other hand,] [to] a 'qualified' rating, which is a rating in the lower range"\* . Starting from this premise and based on the comments, which he describes as "glowing", in his performance appraisal report for 2006-2007, the complainant considers that this report, which after the conciliation procedure includes the following assessments, "Quality: Good – Productivity: Very good – Aptitudes: Very good – Attitude: Very good – Overall rating: Good", should, in reality, have been reinterpreted as follows with reference to the "upper range" sub-category of the "Very good" and "Good" assessments: "Quality: Good (+) – Productivity: Very good (+) – Aptitudes: Very good – Attitude: Very good – Overall rating: Very good (+)"\* . The complainant infers from this that he could and should have been promoted before 1 January 2013. He contends that this conclusion is all the more compelling since his overall assessment ratings in the biennia 2008-2009 and 2010-2011 should, by the same logic, be "2+ [Very good (upper range)]", and not "2 [Very good]"\* .

Pursuing this line of reasoning, the complainant further submits that since, on the basis of his reinterpretation of his performance appraisal report for 2006-2007, he should have been considered as having obtained three overall assessment ratings of "Very good" in the upper range for the three reports concerning 2006-2007, 2008-2009 and 2010-2011, he ought to have been promoted under the "rapid career" scheme to the lower range of grade A4, as provided for in the aforementioned Circular No. 271, that is a promotion after nine years of total experience at grade A3.

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\* Registry's translation.



The complainant then relies on paragraph 13 of the Communiqué from the President of the Office addressed to the President of the A2/3, A3/4 and A4/A4(2) promotion boards for 2013 (“the 2013 Communiqué”), which provides that “[t]he Board may recommend a retroactive promotion with effect from a previous year if this is justified on the basis of ratings or information relating to promotion which were not available to previous Promotion Boards”\*. The complainant considers that the 2013 Promotion Board, accordingly, after reinterpreting his performance appraisal report for 2006-2007 – finalized in March 2011 – and taking into account his performance appraisal reports for 2008-2009 and 2010-2011, should have proposed to the President of the Office to promote him with retroactive effect from 1 July 2011, which corresponded to the midpoint (13 years) of the total experience bracket, as established under the “rapid career” scheme provided for in the aforementioned Circular No. 271, which, he maintains, was applicable in cases where high ratings such as his were obtained. As it appears, the nub of the complainant’s argument is his contention that the “facts continue to be interpreted in a manifestly erroneous manner, without any solid legal justification for disregarding them”\*. There was thus “not only manifest but deliberate misappraisal” in the fact that, over the six years under consideration, the work performed was evaluated as “Very good, without any other qualification” instead of “Very good, upper range”\*. Accordingly, the Tribunal was invited, as a result, to reckon “the proper value”\* of his performance appraisal report for 2006-2007.

6. However, the Tribunal observes that, as noted earlier, this performance appraisal report was already corrected following a conciliation procedure during which the complainant expressly endorsed the corrections introduced to the initial report, and that he also did not subsequently dispute the final version thereof before the Appeals Committee.

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\* Registry’s translation.

In the light of the relevant provisions applicable on the subject as recalled under consideration 5 above, the Tribunal also considers that the Organisation remained within the limits of its discretionary powers when it found that the lower end of the total experience period required for the “rapid career” scheme as set out in the aforementioned Circular No. 271, that is nine years, should correspond to “the best possible performance, i.e. “Excellent” in all aspects over the period being considered”. However, this is not the case for the complainant, who, in his appraisal report for 2006-2007, was assigned, as indicated previously, the following individual and overall ratings: “Quality: Good – Productivity: Very good – Aptitudes: Very good – Attitude: Very good – Overall rating: Good”. Since, over the period considered, that is from 2006 to 2011, the complainant once obtained the rating “Good” under the heading “Quality” and once obtained the overall rating “Good”, it does not appear that the Organisation committed an obvious misappraisal in considering that the complainant’s promotion under the “rapid career” scheme should come at the mid-point of the upper bracket of the total experience period required. In this regard, it is not for the Tribunal to undertake, as the complainant requests, a review of the various assessment ratings given to him in his performance appraisal report for 2006-2007 taking into account the various observations made by the reporting officers when awarding these ratings. Ruling to the contrary would lead the Tribunal to substitute its own assessment of the complainant’s performance for that of the Organisation, which, as recalled above, does not fall within its competence.

It follows that the complainant’s plea that the manner in which his performance from 2006 to 2011 – or from 2007 to 2012 if reference is made strictly to the last six years at work – was appraised was unlawful is unfounded, with the consequence that there is also no need to consider whether, on the basis of that reappraisal of the complainant’s performance, he should have been promoted with effect from 1 July 2011.

7. In any event, the Tribunal fails to see how, in the light of paragraph 13 of the 2013 Communiqué referred to above in consideration 5, the 2013 Promotion Board could have had access to

ratings or information which were not available to previous Promotion Boards and which, consequently, enabled it to recommend a retroactive promotion “with effect from a previous year” to 2013. It is also relevant to note in this respect that both the 2011 Promotion Board and the 2012 Promotion Board had also access to the performance appraisal report for 2006-2007 on which the complainant principally relies.

8. Lastly, the complainant also seeks to base his position on the existence of precedents in that respect where a member of staff was promoted more than a year prior to the year in which the Promotion Board decided on her or his promotion. However, as he provides no details on this point, he fails, in any event, to establish how this would be relevant to his case.

9. In conclusion, the complaint must be dismissed insofar as it calls into question the lawfulness of the choice of 1 July 2013 as the effective date of the complainant’s promotion to grade A4.

10. The complainant further argues that the internal appeals procedure was tainted with two flaws: on the one hand, his right to a hearing before the Appeals Committee was disregarded; on the other hand, the Committee’s opinion contained various mistakes.

11. However, the Tribunal notes first of all that, in the absence of an express provision to the contrary, all that the right to a hearing requires is that the complainant should be free to put his case, either in writing or orally; the appeal body is not obliged to offer him both possibilities (see, in particular, Judgments 4743, consideration 13, 3447, consideration 8, and 3023, consideration 11). It is plain from the written submissions in this regard that the complainant had ample opportunity to present his allegations and arguments in writing and that he was informed, by letter of 19 November 2019, that the chairperson of the chamber to which the internal appeal had been referred had decided not to hold a hearing, since the matter could be properly addressed on the basis of the documentation already filed by the complainant with the Committee.

In this case, the right to be heard orally by the Appeals Committee was indeed applicable at the time when the complainant filed his internal appeal on 23 May 2014. However, following the amendments introduced to the Implementing Rule for Articles 106 to 113 of the Service Regulations by Administrative Council decision CA/D 7/17 of 29 June 2017, which entered into force on 1 July 2017, Article 8(1) of the Service Regulations replaced the right to be heard orally with an option for the chairperson or presiding member of the chamber dealing with the appeal to hold a hearing if she or he considers it useful. According to the Tribunal's case law, any amendment to the procedural rules applicable before an internal appeals body applies directly to cases pending before that body, unless a transitional provision provides otherwise (see, in particular, Judgment 3895, consideration 4). This not being the case in this instance, the chairperson of the chamber concerned, when he ruled on this point on 19 November 2019, correctly applied Article 8 of the aforementioned Service Regulations, in their new version then in force.

The plea thus submitted by the complainant must therefore be rejected.

12. Moreover, the Tribunal can only find that the errors alleged by the complainant concerning the opinion issued by the Appeals Committee on 30 January 2020 in fact overlap with the allegations that he has made in the present complaint, which have been rejected in considerations 5 to 9 above.

Accordingly, the complainant's second plea concerning the unlawfulness of the opinion of the Appeals Committee must also be rejected.

13. It follows from all of the foregoing considerations that the complaint must be dismissed in its entirety, without there being any need to rule on the defendant's request for Annexes 3, 4, 5 and 11 to the complaint to be disregarded, since the Tribunal did not rely on these annexes to render the present judgment.

DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 15 May 2024, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, Mirka Dreger, Registrar.

Delivered on 8 July 2024 by video recording posted on the Tribunal's Internet page.

*(Signed)*

PATRICK FRYDMAN    JACQUES JAUMOTTE    CLÉMENT GASCON

MIRKA DREGER