Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

K. (No. 3) and L. (No. 2)

v.

EPO

138th Session **Judgment No. 4889**

THE ADMINISTRATIVE TRIBUNAL,

Considering the third complaint filed by Mr D. K. against the European Patent Organisation (EPO) on 4 May 2021 and corrected on 7 July, the EPO's reply of 18 November 2021, the complainant's rejoinder of 18 February 2022, the EPO's surrejoinder of 19 May 2022, the applications to intervene filed by Mr A. D., Mr M. D., Mr S. F., Ms L. I., Mr J. M. M. and Mr G. N. on 22 November 2021, and the EPO's comments thereon of 28 February 2022;

Considering the documents produced in that case by the EPO, at the request of the Tribunal, on 3 May 2024;

Considering the second complaint filed by Mr G. L. against the EPO on 4 May 2021 and corrected on 7 July, the EPO's reply of 18 November 2021, the complainant's rejoinder of 18 February 2022 and the EPO's surrejoinder of 19 May 2022;

Considering the documents produced in that case, at the request of the Tribunal, by the complainant on 2 May 2024 and by the EPO on 3 May 2024;

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 cases may be summed up as follows:

The complainants challenge their transposition to a new grade following the introduction of a new career system.

Facts relevant to the present cases are set out in Judgments 4710, 4711 and 4712, delivered in public on 7 July 2023. Suffice it to recall that on 11 December 2014 the Administrative Council of the European Patent Office, the EPO's secretariat, adopted decision CA/D 10/14 introducing a new career system, which entered into force on 1 January 2015. The new career system substantially modified the way job categories were divided. It introduced a "single spine" structure consisting of 17 grades instead of the former three categories of jobs. Two career paths were established: a managerial path and a technical path. Employees continued to enjoy horizontal step advancement and vertical promotion to higher grades, but the underlying principle of the new career system was that progression was based on sustained performance and demonstrated competencies rather than time spent within a step or grade. The decision provided that transposition from the current to the new career system should be made taking into account the employee's situation on 31 December 2014. It also provided that no reduction in basic salary should result from the transposition, and that the salary adjustment method in force since 1 July 2014 should apply to the new salary scales and to the salaries resulting from the transposition.

Mr K., who held grade A3, step 9, on 31 December 2014, had his grade transposed into job group 4 and was assigned grade G12, step 1, with effect from 1 July 2015. Mr L., who held grade A4, step 7, on 31 December 2014, had his grade transposed into job group 4 and was assigned G12, step 4, from 1 July 2015.

Mr K. challenged his payslip for January 2015. Mr L. challenged his individual transposition letter of 30 April 2015. Both of them submitted requests for review, which were rejected. They then filed appeals against the decisions concerning their transposition to the new salary scale.

On 18 November 2020 the Enlarged Chamber of the Appeals Committee issued an opinion on several appeals against the new career system, which challenged in particular the abolition of automatic step advancement and the transposition of grades and which were brought, in the main, by employees in the former grade A4(2) to whom specific provisions of decision CA/D 10/14 applied. As regards those appeals filed by employees who were not in grade A4(2) prior to the reforms – as the two complainants – the Committee referred to its other opinion of the same date, the "master opinion", on the appeals brought against the implementation of the new career system and, in particular, the abolition of automatic step advancement and the transposition of grades. The majority of the Appeals Committee recommended rejecting the appeals as irreceivable in so far as they claimed that a new job group should be created for staff members previously in grade A4(2), as it considered that such a claim did not relate to their administrative status. As regards the receivability of appeals against the new career system, reference was made to the master opinion delivered that same day. The majority recommended rejecting the complainants' appeals as legally unfounded and referred to certain points contained in the master opinion, while expressly rejecting those arguments relating to a breach of acquired rights and legitimate expectations, discrimination and unequal treatment, and a breach by the Organisation of its duty of care towards its employees, its obligation to respect their dignity and the principle of non-retroactivity of administrative acts. However, the Committee unanimously recommended that each of the complainants be awarded moral damages – in the sum of 600 euros – for the unreasonable length of the appeal proceedings.

By letter of 4 February 2021, the complainants were informed of the Office's decision to follow the recommendations of the majority of the Appeals Committee for the reasons stated in its opinion. Consequently, their appeals were dismissed. They were nevertheless each awarded 600 euros in moral damages for the delays in the appeal proceedings and a further 100 euros in moral damages for the further delay that followed the Appeals Committee's deliberations. That is the decision impugned by each of the complainants.

The complainants ask the Tribunal to set aside the impugned decision of 4 February 2021 and to order the EPO to draw all the legal consequences therefrom. In the event that the Tribunal should decide not to order the EPO to draw all the legal consequences of the setting aside of the impugned decision, they ask that the EPO be ordered to compensate them for the whole of the financial loss they consider that they have suffered and to pay interest at the rate of 5 per cent on the sums due to each of them for this financial loss from 2015 to the date of the public delivery of the judgment. Lastly, they ask the Tribunal to order the EPO to pay them a sum to be determined in respect of the costs they have incurred in defending their case.

The EPO asks the Tribunal to dismiss the complaints as irreceivable to the extent that the complainants challenge the specific rules of the new career system governing step advancements, promotions, post allowances and other allowances, since those rules had not been applied to them at the time when they filed their internal appeals or their complaints before the Tribunal. The EPO also asserts that the complaints are entirely unfounded.

CONSIDERATIONS

1. These complaints are among a large number of disputes brought before the Tribunal in relation to the European Patent Office's new career system, introduced by Administrative Council's decision CA/D 10/14 of 11 December 2014, which entered into force on 1 January 2015. It should be recalled that this new system brought about extensive changes to the structure of employees' grades, by establishing new "career paths", and provided that horizontal step advancement was no longer based on seniority but on the assessment of performance and competencies.

The complainants impugn before the Tribunal the decision of the Vice-President of Directorate-General 4 dated 4 February 2021 which rejected the internal appeals they had filed to challenge, in particular, the transposition to the new grade and step assigned to them, with effect from 1 July 2015, in the job group within which they had been

reclassified. That transposition, provided for by Article 56 of decision CA/D 10/14, had been implemented, in accordance with paragraph 1 of that article, by reference to their basic salary on 31 December 2014. The complainants also challenge the provisions of decision CA/D 10/14 abolishing the former automatic step advancement based on seniority and those establishing new rules for grade promotions, which amended, respectively, Articles 48 and 49 of the Service Regulations for permanent employees of the Office.

2. Six applications to intervene were filed in one of the cases.

3. The two complaints essentially seek the same redress, rest on very similar submissions and raise the same legal issues. They will therefore be joined to form the subject of a single judgment.

4. By Judgments 4710, 4711 and 4712, delivered in public on 7 July 2023, the Tribunal dismissed the complaints of another employee concerning the new career system, which were selected as "lead complaints" in the dispute in question and which challenged, respectively, the lawfulness of decision CA/D 10/14 itself, the abolition of the former automatic step advancement and the transposition of the complainant into a new job group as a result of the grade structure reform. The issues raised in the present complaints have, essentially, already been examined by the Tribunal in those judgments, to which extensive reference will therefore be made in the considerations below.

5. The Tribunal notes that the complainants' line of argument relates in part to the particular situation of those employees who, prior to the introduction of the new career system, held grade A4(2). Staff members in that previous grade were subject to specific transitional provisions, contained in Article 57 of decision CA/D 10/14, which provided inter alia that employees graded in A4(2) whose basic salary was above the amount corresponding to grade 13, step 5, in the new salary scales would not be transposed into those new scales. The legal consequences of that non-transposition has led to numerous disputes on the part of the employees concerned. The arguments relied on in this

regard are of no avail in the context of the present complaints, since the complainants, one of whom held grade A3, step 9, before the reform and the other held grade A4, step 7, were not graded in A4(2) and therefore the provisions of Article 57 did not apply to them. The merits of those arguments will, however, be duly examined by the Tribunal when it rules on complaints lodged by affected employees (provided, of course, that their complaints are not dismissed for irreceivability on any other grounds).

6. The complainants devote a large part of their arguments to one plea according to which the abolition of the former system of automatic step advancement based on seniority and its replacement by merit-based step advancement constituted a breach of their acquired rights. They submit, in this regard, that advancement based on seniority was a fundamental term of their employment, which induced them to join – and then remain at – the EPO, and that its abolition was "unjustified and unreasonable". They also submit that this action had a significant adverse effect on the amount of their remuneration and, therefore, on their future pension.

However, in consideration 8 of the aforementioned Judgment 4711 (referred to in Judgments 4710 and 4712), the Tribunal rejected similar arguments and refuted the existence of a breach of acquired rights. The Tribunal stated the following:

> "According to the Tribunal's case law, established for example in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, the amendment of a provision governing an official's situation to her or his detriment constitutes a breach of an acquired right only when such an amendment adversely affects the balance of contractual obligations, or alters fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced her or him to stay on. In order for there to be a breach of an acquired right, the amendment to the applicable text must relate to a fundamental and essential term of employment. Judgment 832, consideration 14, details a three-part test for determining whether the altered term is fundamental and essential. The test is as follows:

(1) The nature of the altered term: 'It may be in the contract or in the Staff Regulations or Staff Rules or in a decision, and whereas the contract or a decision may give rise to acquired rights the regulations and rules do not necessarily do so.'

(2) The reason for the change: 'It is material that the terms of appointment may often have to be adapted to circumstances, and there will ordinarily be no acquired right when a rule or a clause depends on variables such as the cost-of-living index or the value of the currency. Nor can the finances of the body that applies the terms of appointment be discounted.'

(3) The consequence of allowing or disallowing an acquired right and the effect it will have on staff pay and benefits, and how those who plead an acquired right fare as against others.

In addition, as the Tribunal observed in Judgment 4028, consideration 13, international civil servants are not entitled to have all the conditions of employment or retirement laid down in the provisions of the staff rules and regulations in force at the time of their recruitment applied to them throughout their career and retirement. Most of those conditions can be altered though depending on the nature and importance of the provision in question, staff may have an acquired right to its continued application.

In the present case:

(1) the step advancement system was established by the Service Regulations, which are part of the terms of employment of the staff members, as individual contracts refer to the Service Regulations;

(2) the reason for the change was clearly explained by the Organisation and does not appear to be unreasonable, as the previous system based on seniority resulted in a 'career plateau' at an early age and could be detrimental to motivation and performance; the appropriateness of the change was confirmed by subsequent actuarial and financial studies; and

(3) the step advancement system was not suppressed, but only modified in its requirements: it is no longer based on mere seniority, but, instead, on the appraisal of performance and expected competencies.

The previous salary (which also resulted from previous step advancements) has been preserved by the transitional provisions (see Article 55(2) of CA/D 10/14 decision, that reads: 'No reduction in basic salary shall result from the transposition').

Opportunities for future step advancement are not precluded to staff members. Nor did the complainant prove that the new system makes it impossible or unreasonably difficult to achieve a step advancement based on appraisal of performance and on expected competencies. Even though the

> new system is not automatic, neither is it left to an unfettered discretion. Indeed, it is based on performance and expected competencies, which are to be assessed according to an objective appraisal system.
>
> In these circumstances, there is no breach of acquired rights, as the former salary is preserved, and future step advancements are not precluded. There is no unreasonable alteration of the balance of contractual obligations, as the step advancement is related to the discharge of the staff members' obligations. There is no alteration of the fundamental terms of employment in consideration of which the official accepted the appointment (see Judgment 4274, considerations 16 to 18, for a similar reasoning in a similar situation)."

The Tribunal sees no reason to depart, in the present cases, from the solution thus adopted in Judgment 4711. The plea put forward by the complainants will therefore be rejected for the same reasons.

7. Expanding their arguments on this point, the complainants submit that their acquired rights were also breached by the amendment of the provisions governing grade promotion. They consider that this amendment unlawfully brought to an end the system for "quasi-automatic promotion" which, they claim, was in force prior to the disputed reform and also constituted a fundamental term of their employment.

But the Tribunal cannot accept this line of argument either.

It is well settled in the case law, drawing on the same principles as those set out in the aforementioned consideration 8 of Judgment 4711, that the provisions providing for the grant of promotion within an international organisation do not confer any acquired rights on staff. Unless the new rules substantially deprive staff of their former prospects for advancement, an organisation always has the ability to amend those arrangements according to need (see, in particular, Judgments 3524, consideration 3, 3256, consideration 14, or 1025, consideration 4).

In the present case, it is plain from the file that, although the effect of decision CA/D 10/14 on the rules governing promotion was indeed to make career progression more dependent on the assessment of performance and evidence of expected competencies, the opportunities

for promotion open to staff were not substantially affected. The three methods of accessing a higher grade set out in the previous provisions of Article 49 of the Service Regulations – namely, the normal procedure of promotion to the next immediate higher grade, the selection procedure for appointment to a post open to competition and the post reclassification procedure – were thus maintained, and the EPO submits, without being effectively contradicted by the complainants on that point, that there were in fact more opportunities for promotion under the new system due to the increased number of grades.

It follows that it was lawful for the provisions in question, which deal with simple arrangements for the grant of promotion within the meaning of the aforementioned case law, to amend the earlier text without causing any breach of acquired rights.

Furthermore, the Tribunal notes that, contrary to the view that the complainants appear to take in their submissions, there was no right, prior to the introduction of the new career system, to a "quasi-automatic promotion" recognised by the Service Regulations. The provisions of the aforementioned Article 49 of those Regulations in force at the time stipulated that promotion to the next higher grade "[was to] be by selection from among permanent employees who [had] the necessary qualifications, after consideration of their ability and of reports on them" and that the President of the Office would make a decision on the basis of a list of permanent employees eligible for promotion drawn up by a Promotion Board "based on a comparison of their merits" and "presented in order of merit". Although it appears that in fact grade promotion took place primarily on the basis of seniority, as the EPO itself acknowledges in its reply, a practice cannot become legally binding if it contravenes a written rule (see, for example, Judgments 4555, consideration 11, or 3883, consideration 20). The practice in question could not, therefore, create any acquired right.

8. In another plea, the complainants challenge the lawfulness of the six-month gap, provided for by decision CA/D 10/14, between the date when the new career system came into force, which, under Article 54 of that decision, was 1 January 2015, and the date when staff

were transposed to their new grade and step, which, pursuant to Article 56(5) of the decision, was 1 July 2015. They maintain that this created a "legal void" between the two dates in question, associated with a "six-month delay" in the implementation of the new system, and that this breached their right to a proper administrative position.

This plea is unfounded.

The Tribunal notes first of all that the complainants' reference to a "delay" in the implementation of the reform in question is incorrect. A "delay" implies a failure to comply with a deadline fixed at the outset or with an anticipated timeframe. However, the six-month gap between the entry into force of the new career system and the transposition of staff was provided for at the inception of the reform, as has just been recalled, by decision CA/D 10/14 itself. Moreover, the six months which this gave the EPO to carry out the transposition of staff members to their new grades and steps does not seem remotely unreasonable in view of the scale and complexity of the operation involved. Furthermore, it must be noted that the deadline of 1 July 2015 set out in the aforementioned Article 56 was indeed met, and that in the meantime the complainants had been duly informed, by letters of 30 April 2015, of the terms of their transposition.

Neither can the complainants rightfully argue that there was any breach of the right to a proper administrative position. Under that right, an official can expect her or his situation, as it results in particular from individual decisions and factual circumstances, to comply with the applicable statutory provisions. By definition, it cannot therefore be relied upon to challenge a decision of the Administrative Council, the purpose of which is, as in the present case, to define the regulations applicable to staff members, whether those regulations be permanent or transitional. For this reason, the Tribunal's case law on the matter relied on by the complainants is irrelevant.

Lastly, the Tribunal fails to see how the complainants were in a "legal void" from 1 January to 30 June 2015, as they allege. While they waited for their transposition to take effect from 1 July 2015, their old grades and steps remained as they were. Admittedly, they were subject to a set of temporary rules, but that was expressly provided for in the

aforementioned Article 56 of decision CA/D 10/14, by way of transitional provisions pending the entry into force of the new career system. There were, therefore, suitable rules governing the complainants' situation at all times.

9. The complainants also submit that, in adopting the contested decisions, the EPO failed in its duty of care towards its staff. They consider that the Organisation did not take the interests of its staff into consideration and that the disputed reform caused hardship to staff that was both unnecessary, given that there were no financial difficulties to render it a necessity, and undue, given the scale of the ensuing loss of earnings.

But this line of argument cannot succeed.

As regards the arguments contesting the need for the reform, it is not for the Tribunal, in any event, to review the advisability or merits of the changes which an international organisation wishes to make to salary structures or to the arrangements for career progression, that form part of general staff management policy which an organisation is free to pursue in accordance with its interests (see, for example, Judgments 4274, consideration 15, or 3275, consideration 8).

As for the adverse consequences of abolishing automatic step advancement and revising the rules on promotion, it is clear from decision CA/D 10/14 that, by maintaining basic salaries at their previous level, making compensatory arrangements and introducing suitable transitional measures, any such consequences were kept to a minimum.

Furthermore, it must be noted that, in consideration 10 of the aforementioned Judgment 4711 (as well as in Judgment 4712, which referred to it), the Tribunal rejected similar arguments that the EPO had breached its duty of care by failing to mitigate the negative consequences of the reform on staff members. The Tribunal sees no reason to adopt a different solution in the present cases.

10. Lastly, the complainants ask that the EPO be ordered to pay them damages for the unreasonable delay in the internal appeal procedure.

The Tribunal notes that more than five years passed – in fact, five and a half years in one of the two cases – between the complainants lodging their internal appeals and the final decision on those appeals being delivered on 4 February 2021. Such a delay is clearly excessive. However, in the aforementioned Judgments 4710, 4711 and 4712, the context for which was an internal appeal procedure relating to various contested decisions which lasted a similar length of time as that seen here, the Tribunal found that the compensation of 700 euros paid by the Organisation to the staff member in question was sufficient to remedy the injury he had suffered. In the present cases, the complainants were awarded that same sum under the impugned decision, and the arguments they raise in this regard fail to establish that, in their cases, the injury caused by the delay in the internal appeal procedure warrants the award of a greater sum.

The claim for compensation will therefore be dismissed.

11. It follows from the foregoing that the complaints must be dismissed in their entirety, without there being any need to rule on the objection to receivability raised by the EPO in relation to some of the claims.

12. The applications to intervene must, as a consequence, also be dismissed, without there being any need to rule on the objections raised by the EPO as to their receivability.

DECISION

For the above reasons,

The complaints are dismissed, as are the applications to intervene.

In witness of this judgment, adopted on 17 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