Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

S. (No. 2)

v.

EPO

140th Session **Judgment No. 5071**

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr J.-C. S. against the European Patent Organisation (EPO) on 10 November 2021, the EPO's reply of 22 February 2022, the complainant's rejoinder of 7 March 2022 and the EPO's surrejoinder of 7 June 2022;

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

Having examined the written submissions;

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

The complainant challenges the amount of the salary advancement he received under transitional provisions applicable to chairmen and members of the Boards of Appeal following the introduction of a new career system.

The complainant joined the European Patent Office, the EPO's secretariat, in 1989 as a patent examiner. At the material time, he was a Board of Appeal member.

In December 2014 the Administrative Council of the European Patent Office adopted decision CA/D 10/14, which introduced a new career system with effect from 1 January 2015. This decision, which substantially amended the Service Regulations, introduced a structure under which posts were classified into six "job groups" and 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 the transposition of employees to their new job group, which was set to take place on 1 July 2015, should take into account their 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.

On 25 June 2015 the Administrative Council adopted decision CA/D 4/15, establishing transitional provisions for the chairmen and members of the Boards of Appeal with respect to the reform in question. Article 2(1)(b) of this decision provided, in particular, that members of the Boards of Appeal would be granted a salary advancement, equivalent to the amount of one step in grade, after 12 months of service if they had a basic salary of or below the amount of that for grade G14, step 1, and after 24 months of service if they had a basic salary above that amount. Article 2(2) provided that this salary advancement was to have the same effect for the purpose of the definition of the basic salary as a step advancement as foreseen under Article 48 of the Service Regulations, and that it would be granted during the transitional period as from the month following the month when the aforementioned requirements were met.

The complainant, who held grade A5, step 11, on 31 December 2014, was assigned grade G14, step 4, from 1 July 2015. In April 2016 he received his payslip for that month. This payslip reflected the salary advancement applied to him under Article 2 of decision CA/D 4/15, after 24 months' service, since, at the time of the transition to the new career system, his basic salary was higher than that corresponding to grade G14, step 1.

On 22 July 2016 the complainant wrote to the Chairman of the Administrative Council submitting a "[r]equest for review" of decision CA/D 4/15. He claimed in particular that Article 2(1)(b) of that decision should be amended so as to make the salary advancement awarded to a member of a Board of Appeal after 24 months' service with a basic salary higher than that for grade G14, step 1, equivalent to the amount of one step in grade under the career system in force prior to the adoption of the transitional measures, rather than under the new system. As a consequence, he claimed to be entitled, with effect from 1 April 2016, to a salary advancement of 420.84 euros, rather than the 258.71 euros which he had received according to the figures appearing on his payslip for April 2016. On 12 September 2016 the Chairman of the Administrative Council replied to him that his request for review, which was to be regarded as a challenge to the individual implementation of decision CA/D 4/15 to his case, had been redirected to the President of the Office who was the competent authority in this regard, according to the case law of the Tribunal. On 23 September 2016 the President of the Office informed the complainant that this request for review was rejected as unfounded.

On 20 December 2016 the complainant lodged an internal appeal against that rejection decision. He explained that, before the transitional provisions of decision CA/D 4/15 came into force, an employee who, like him, held grade A5, step 11, would receive a step advancement after 24 months' service on the preceding step, resulting in a salary advancement of 420.84 euros. However, under the new career system, the amount of his salary advancement was reduced from 420.84 euros to 258.71 euros, even though he had already accumulated 14 months' service on the step when decision CA/D 4/15 came into force on 25 June 2015. In his view, the implementation of decision CA/D 4/15 breached his legitimate expectations and was arbitrary because no adequate measure had been put in place to mitigate the adverse consequences of the reform. He also claimed that there had been a breach of the principle of equal treatment because, under the new system, career progression for members of the Boards of Appeal was much slower than for other employees, and there were differences in

step advancement, even between members of the Boards of Appeal, depending on their step within the grade.

In its opinion, delivered on 13 July 2021, the Appeals Committee unanimously recommended that the appeal be rejected as unfounded, on the grounds that the transitional measures contained in decision CA/D 4/15 were not unreasonable to the extent that they were aimed at slowing down the automatic progression in salary of members of the Boards of Appeal. Furthermore, the modalities adopted for achieving that aim were not disproportionate or inappropriate in their effect on the complainant. The Appeals Committee therefore considered that there was a reasonable and objective justification for the difference in the conditions of salary advancement laid down in Article 2 of decision CA/D 4/15, meaning that the contested individual decision, namely the payslip for April 2016, did not involve any unequal treatment or discrimination towards the complainant. It nevertheless recommended that he be awarded moral damages for the duration of the appeal proceedings, even though he had not requested them.

By a letter of 11 October 2021, the complainant was informed of the Office's decision to reject his appeal for the reasons set out by the Appeals Committee in its opinion. He was, however, awarded moral damages for the length of the internal appeal procedure. That is the decision impugned by the complainant.

The complainant asks the Tribunal to set aside the impugned decision of 11 October 2021, to award him, with effect from 1 April 2016, a salary advancement of an amount equivalent to one step in his former grade A5, namely 420.84 euros. He also seeks reimbursement of the unpaid amounts, together with interest at a rate of 4 per cent per annum, and claims the award of "costs at a flat rate of 100 [euros]".

The EPO asks the Tribunal to dismiss the complaint as unfounded.

CONSIDERATIONS

1. The complainant impugns before the Tribunal the decision of 11 October 2021 by which the Vice-President of Directorate-General 4, in line with the unanimous recommendation of the Appeals Committee, rejected his internal appeal challenging the amount of the salary advancement he received, from 1 April 2016 onwards, in the context of specific provisions applicable to members of the Boards of Appeal.

2. The complainant has requested oral proceedings. However, in view of the purely legal nature of the matters at issue, the parties' very clear written submissions and the ample evidence produced, the Tribunal considers that it is fully informed of the case and finds it unnecessary to grant this request.

3. The present complaint is among a large number of disputes brought before the Tribunal in relation to the European Patent Office's new career system, introduced by the 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 the new system substantially modified the grading system for employees by creating a new method of classifying posts into six "job groups", replacing the former division into three "categories", and provided that step advancement within a grade would no longer be based on seniority but on the assessment of performance and competencies.

However, for chairmen and members of the Boards of Appeal, the implementation of certain aspects of the new career system, and in particular of merit-based step advancement, raised particular difficulties linked with the need to safeguard the independence conferred on them, in view of the judicial nature of their duties, by Article 23 of the European Patent Convention. On adoption of the reform, it was therefore decided that the rules dealing with those particular aspects would not apply to them until specific provisions dealing with this issue came into force – which finally occurred in June 2016.

4. Pending the finalisation of these new provisions, the Administrative Council adopted, on 25 June 2015, decision CA/D 4/15 establishing, with effect from that date, transitional provisions for the chairmen and members of the Boards of Appeal with respect to the implementation of the new career system.

Article 3 of that decision confirmed, in particular, that the provisions of Article 48 of the Service Regulations, relating to step advancement, as they resulted from decision CA/D 10/14, did not apply to the employees in question for the time being.

In order to mitigate the adverse consequences on those employees of the resulting temporary lack of all step advancement, given that the former system of seniority-based step advancement had been abolished, including for them, Article 2 of decision CA/D 4/15 provided that, during the transitional period, they were to be granted a salary advancement that would have the same effect on their basic salary as the award of one further step.

Article 2 was worded as follows:

> "1. As a transitional provision for 2015 or until any further decision on this matter, an employee appointed in accordance with Article 11(3) [of the European Patent Convention] as a Chairman or a Member of the Boards of Appeal, within the limit of the number of steps laid down for each relevant job group under the Service Regulations, shall be granted a salary advancement, equivalent to the amount of one step in grade, as follows:
>
> (a) A Board of Appeal Chairman: [...];
>
> (b) A Board of Appeal Member: after 12 months of service with a basic salary of or below the amount of G14 step 1, and after 24 months of service with a basic salary above the aforesaid amount;
>
> 2. The aforesaid salary advancement has the same effect for the purpose of the definition of the basic salary as a step advancement as foreseen under Article 48 of the Service Regulations and shall be granted during the transitional period as from the month following that in which the above-mentioned requirements are met."

5. It was pursuant to these provisions that the complainant, who had reached step 11 of the former grade A5 on 1 April 2014 and had been transposed to the new grade G14, step 4, on 1 July 2015, received,

with effect from 1 April 2016, the salary advancement the amount of which he is contesting.

6. In support of his claims, the complainant submits, primarily, that the Office misinterpreted the aforementioned provisions of Article 2 of decision CA/D 4/15, in that it construed the grade referred to in paragraph 1, which was to be taken into account when calculating the salary advancement of a Board of Appeal member, as the grade assigned to the employee in question under the new career system rather than the grade she or he had held under the previous system. According to the complainant, it was in fact the former grade, not the new one, to which reference had to be made when determining the amount "equivalent to [...] one step in grade [for a Board of Appeal Member]" under those provisions. He maintains that this led, in his own case, to the incorrect award of an advancement equivalent to one step in grade G14, amounting to 258.71 euros, whereas it should in fact have been equivalent to one step in his former grade A5, that is 420.84 euros.

7. According to the Tribunal's case law, it is a primary rule of interpretation that words are to be given their obvious and ordinary meaning and must be construed objectively in their context and in keeping with their purport and purpose (see, for example, Judgments 4796, consideration 3, 4066, consideration 7, 4031, consideration 5, or 3744, consideration 8).

Should an ambiguity remain in the relevant provision after this method of construction is applied, the regulations or rules of an international organisation must, in principle, be construed in favour of the interests of its staff and not those of the organisation (see, for example, Judgments 4639, consideration 3, 3539, consideration 8, 3355, consideration 16, or 2276, consideration 4).

8. In the present case, the Tribunal considers that, while the wording of Article 2 of decision CA/D 4/15 would certainly have been clearer had it expressly specified which grade the Administrative Council was referring to, there can be no doubt that this was the new grade assigned pursuant to decision CA/D 10/14.

Firstly, this can be deduced from a literal analysis of the provisions in question. In this regard, the Tribunal notes, in particular, that it was specified in paragraph 1, cited above, that the salary advancement equivalent to one step in grade was to be granted "within the limit of the number of steps laid down for each relevant job group under the Service Regulations". As already noted, this concept of "job group" was introduced by decision CA/D 10/14, meaning that the grade referred to must be the grade assigned under the new career system. This view is corroborated by the fact that Article 2(1)(b) provides for a difference in treatment of the advancement based on a criterion that refers to "grade G14, step 1", that is to a grade found in the new system.

Secondly, it is obvious from the context in which decision CA/D 4/15 was adopted on 25 June 2015 that references to grades in that decision were intended by the Administrative Council as references to the new grades under the Service Regulations. As at that date, the new grades, created on 1 January 2015, were already in force and, while the transposition of employees to the new grades was not scheduled to take place until 1 July 2015, it was then, precisely, an imminent event.

9. In support of his argument, the complainant relies on the wording of preparatory document CA/49/15, submitted to the Administrative Council by the President of the Office with a view to the adoption of decision CA/D 4/15, which explained that the proposed transitional provisions were intended to "maintain career development for the Chairmen and Members of the [Boards of Appeal] with respect to the grant of salary advancements until the [Administrative Council] decide[d] on the concrete implementation of the new career system to these appointees".

However, contrary to what the complainant maintains, the Tribunal does not consider that it is possible to deduce from this wording that the provisions in question were intended to guarantee to the chairmen and members of the Boards of Appeal a salary advancement equivalent to that which they would have received under their former grade if the previous career system had continued to apply during the transitional period in question. The wording must instead be construed to mean that

the aim of the provisions, as stated in consideration 4 above, was to mitigate the adverse consequences of the situation whereby those employees were temporarily denied all possibility of step advancement, by ensuring they would receive a salary advancement equivalent to that to which they would have been entitled if the new arrangements for salary advancements had been defined at the time. Those arrangements would necessarily have referred to the new grades in force.

10. Insofar as the Tribunal considers the aforementioned provisions of Article 2 of decision CA/D 4/15 to be unambiguous, there is no need to accede to the complainant's request to apply the case law recalled in consideration 7, according to which ambiguous provisions are to be construed, as a matter of principle, in favour of the interests of the staff.

11. Moreover, the Tribunal notes that it is apparent from the file that the complainant himself originally took the view that the provisions of Article 2 should be interpreted as referring to a salary advancement equivalent to one step in the new grade. In the "[r]equest for review of decision CA/D 4/15" which he had submitted to the Chairman of the Administrative Council on 22 July 2016, he claimed that the provisions should be amended so that the advancement in question would instead be calculated on the basis of a step in the former grade, which shows that what he was then challenging was not a misapplication of the provisions, but their actual content. It was only when this request for review – which the competent authorities regarded, in reality, as a challenge to the individual decision taken against the complainant – was rejected by the Office that the focus of the complainant's line of argument shifted to an alleged misinterpretation of the provisions in question.

12. The complainant submits that, in the event that Article 2 of decision CA/D 4/15 should be interpreted as referring to the grade assigned to members of the Boards of Appeal under the new career system – which, as the Tribunal just confirmed, is indeed the case – that

decision would then be unlawful in that it breached his legitimate expectations and the principle of equal treatment.

These subsidiary pleas are also unfounded.

13. As regards the alleged breach of legitimate expectations, it is well established in the Tribunal's case law that no such breach can occur when the rule on which the expectations claimed by an employee are based has been lawfully abolished (see, in particular, Judgments 4990, consideration 4, 4712, consideration 5, and 3256, consideration 16).

According to the complainant, the former career system was not abolished by decision CA/D 10/14, as the creation of the new system did not in itself lead to such an abolition, and the two systems should be regarded as having temporarily coexisted. However, in the Tribunal's view, there is no doubt that the effect of Article 54 of that decision, which provided that the decision would enter into force on 1 January 2015, was to abolish the former career system on that same date. The fact that certain aspects of the former system continued to apply in the interim under transitional provisions provided for by that same decision – such as the former grading system, which remained in place until 1 July 2015 – does not alter that finding. Furthermore, the Tribunal has already held, in particular in Judgments 4710, 4711 and 4712, that the abolition was lawful.

The complainant also claims to have legitimate expectations stemming from the content of decision CA/D 4/15 itself, as well as from the wording of the preparatory document which preceded that decision and which is referred to in consideration 9 above. However, these arguments are irrelevant because, as already stated, the decision and the document in question do not have the meaning ascribed to them by the complainant as regards the determination of the contested salary advancement.

It would, of course, have been possible for legitimate expectations to arise from some other form of undertaking given by the Organisation, in the context of the implemented reform, concerning the arrangements for calculating the salary advancement (see, for example, Judgment 4898,

consideration 12). However, there is no such undertaking evident from the file.

14. As regards the alleged breach of the principle of equal treatment, it should be recalled that, according to the Tribunal's case law, that principle requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other hand, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity (see, for example, Judgments 4681, consideration 9, 4277, consideration 21, or 3900, consideration 12). The Tribunal has also specified that an organisation which is required to adopt rules that take dissimilar situations into account has a broad discretion in defining those rules (see, in particular, Judgments 4995, consideration 16, 2194, consideration 6(a), and 1990, consideration 7).

15. In the present case, the complainant essentially claims that, at the material time, members of the Boards of Appeal above grade G14, step 1, were not treated equally with the Office's other employees – including those on the same level of the grading scale – who could experience more rapid career progression.

However, as the Appeals Committee rightly pointed out in its opinion of 13 July 2021, those other employees, who, from the time the new career system came into force, were subject to a merit-based step advancement, were, in that respect, in a fundamentally different situation from that of members of the Boards of Appeal, for whom the salary advancement provided for in decision CA/D 4/15 remained automatically granted on the basis of seniority. In addition, the difference between the rules applied retrospectively to these two categories of employees – namely the systematic award to members of the Boards of Appeal of a salary advancement equivalent to one step at the end of 24 months' service (or 12 months, for members at a level below or equal to grade G14, step 1) and the possibility, for the other employees, to advance by one step (or two in exceptional cases) after 12 months' service, conditional on an assessment of their merits – was in keeping with the difference between their situations. Lastly, nothing

in the content of those rules points to any abuse of the wide power of discretion that the EPO had in the matter and, although the complainant seems to dispute the very idea that a special career progression regime for members of the Boards of Appeal was necessary in order to protect their independence – which he regards as a "fanciful" justification for the difference in treatment in question – the Tribunal considers that it was open to the Organisation to choose to apply that regime to them while awaiting full details of how decision CA/D 10/14 was to be applied to their specific situation.

16. The complainant submits that the aforementioned provisions of Article 2 of decision CA/D 4/15 also led to unlawful unequal treatment as between the members of the Boards of Appeal themselves, insofar as they made the award of a salary advancement to them conditional on lengths of service which differed depending on whether or not their salary level was above the level corresponding to grade G14, step 1.

It is apparent from the file that the requirement for 24 months of service, rather than 12 months, above that level was designed to slow down automatic salary progression for members of the Boards of Appeal so as to avoid the impact of a salary scale cap as they approached the end of their careers. That objective, which forms part of the Office's staff management policy, is not unreasonable, and the use of a criterion based on an employee's position on the salary scale is clearly appropriate in view of that objective. The Tribunal also notes that a similar threshold already existed, in the former grade A5, in the previous career structure for members of the Boards of Appeal.

When a distinct set of legal rules is created, linked to a certain grade level, it will inevitably affect the employees concerned differently, depending on their individual circumstances, and that is not, in itself, unlawful. Nonetheless, there would be reason to censure the criterion used for this purpose if it stemmed from a manifest error and thus amounted to an abuse of the power of discretion that organisations have in this matter. However, in the present case, there is nothing to suggest

that, by fixing the threshold referred to above as grade G14, step 1, the EPO committed a manifest error.

17. Since none of the complainant's pleas succeeds, the complaint will be dismissed in its entirety.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 28 May 2025, Mr Patrick Frydman, President of the Tribunal, Mr Jacques Jaumotte, Judge, and Mr Clément Gascon, Judge, sign below, as do I, René M. Vargas M., Registrar.

Delivered on 3 July 2025 by video recording posted on the Tribunal's Internet page.

(Signed)

PATRICK FRYDMAN JACQUES JAUMOTTE CLEMENT GASCON

RENÉ M. VARGAS M.