

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

**107th Session**

**Judgment No. 2832**

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr J. D.-S. against the European Patent Organisation (EPO) on 18 January 2008 and corrected on 24 January, the Organisation's reply of 20 May, the complainant's rejoinder of 7 July, the EPO's surrejoinder of 29 October 2008 including its additional comments submitted at the Tribunal's request, the complainant's letter to the President of the Tribunal dated 8 April 2009 and the Organisation's observations thereon dated 20 April 2009;

Considering Article II, paragraph 5, of the Statute of the Tribunal;  
Having examined the written submissions;

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

A. Facts relevant to this dispute are to be found in Judgments 1559, 1832, 1891, 2040, 2299, 2412, 2579 and 2668 concerning the complainant's previous complaints. In the course of his career as an examiner at the European Patent Office, the EPO's secretariat, the complainant was promoted to grade A4 in 1989 and then to grade A4(2) with effect from 1 November 2001. He applied on several occasions for grade A5 posts as a technically qualified member of a

board of appeal in Directorate-General 3 (DG3), but his applications were unsuccessful. He retired on 1 March 2007 and is in receipt of a retirement pension calculated on the basis of grade A4(2), step 11.

On 16 July 2007, following the publication of an issue of the *EPO Gazette* announcing, inter alia, the appointment, with effect from 1 June 2007, of several grade A3 examiners as members of an appeal board, the complainant wrote to the Chairman of the Administrative Council requesting that the said appointments be cancelled and that his retirement pension be calculated on the basis of the highest step (step 13) of grade A5. While admitting that in Judgment 2040 the Tribunal had acknowledged the EPO's right to select A3 examiners to fill the posts in question because of the special duties they involve, the complainant claimed that the judgment cast doubt on a statement made by the President of the Office in December 1994 to the effect that the Office respected general legal principles, including human rights. He further contended that his right to be heard had been violated because the DG3 Selection Board had turned down his request for an interview in July 2001 and the Tribunal had delivered some of its judgments concerning him without holding the hearings for which he had applied. He also accused the Council of taking its decisions "without ensuring staff representation on its Appeals Committee". The complainant was informed in a letter dated 31 October 2007 that the Administrative Council had found his appeal manifestly irreceivable for want of a cause of action, and had taken a "final" decision to dismiss it without seeking the opinion of its Appeals Committee. That is the impugned decision.

B. The complainant challenges the finding that he has no cause of action. He claims to have "every right" to seek redress for the "considerable" injury caused by the fact that he has been "unfairly overlooked" since 1991. In this regard he points out that the appointments of grade A3 examiners to grade A5 posts are "extremely unfair and demotivating for grade A4 examiners who have legitimately aspired for years to be appointed to such posts". He also considers that he has an obvious interest in having his retirement pension "raised to its proper level".

On the merits the complainant notes that appointment as a member of an appeal board constitutes a career extension for an examiner, and he emphasises that some examiners at grade A4(2) – a grade which, according to him, is given only to “the most meritorious staff members” – have been appointed to such posts. He asserts that the Organisation took advantage of a legal loophole to justify the appointment of grade A3 examiners to grade A5 posts and that it continued to do so by appointing grade A3 staff members in 2006 to grade A5 director posts, flouting the rules laid down in the Service Regulations for Permanent Employees of the European Patent Office. As he sees it, the appointment of a grade A3 staff member to a grade A5 post constitutes a discriminatory practice of which he is the “prime victim”, a practice that has given rise to protests on the part of both examiners and the Staff Committee. He considers that if this practice had not existed, he would have attained grade A5 some time ago and the DG3 Selection Board would certainly not have included a comment in its minutes of 2 May 1996 casting doubt on his competence and conduct, which is “utterly false” in the light of the content of his performance reports. Lastly, the complainant asserts that his right to be heard has never been respected. He cites as evidence the fact that the Vice-President in charge of DG3 failed to act on “his letter of protest of 29 June 2001” and that Judgments 2040 and 2299 were delivered “notwithstanding the improper composition of the Appeals Committee of the Administrative Council”.

The complainant asks the Tribunal to declare that there was “abuse on the part of the appointing authority”. He also seeks to have his retirement pension calculated on the basis of grade A5, step 13. Lastly, he asks the Tribunal to award him at least 5,000 euros in damages for the “considerable” harm, particularly moral harm, that he has suffered “for many years”, as well as 2,000 euros in respect of costs.

C. In its reply the EPO submits that the complaint is irreceivable because the internal appeal was itself irreceivable on two counts. On the one hand, the complainant had no cause of action since appointments made after his retirement could not adversely affect his

career prospects. On the other hand, as he did not apply to be appointed in place of the successful candidates, his initiative is to be considered as a form of “class action”. A complaint is receivable only if the staff member has suffered an “actual and present” injury, which is manifestly not the case, since the complainant has retired. Furthermore, the EPO draws attention to the fact that, before the Tribunal, the complainant is no longer requesting that the disputed appointments be cancelled.

On the merits and subsidiarily, the Organisation states that the pleas raised by the complainant were dismissed by the Tribunal in judgments that carry the authority of *res judicata*. Referring to Judgment 2040, it points out that an appointment to grade A5 is not a promotion within the meaning of Article 49(7) of the Service Regulations, so that it is not essential to have two years’ seniority in grade A4 in order to be appointed. In the same judgment the Tribunal found no evidence to support the allegation of abuse of authority, and the complainant has produced no evidence in this case warranting a review of that finding. The EPO emphasises that it follows from Judgment 2292, delivered in another case against the Organisation, that the complainant’s plea concerning alleged discrimination has already been examined in the light of the principles set forth in the European Convention on Human Rights. It further notes that the Tribunal has already concluded that there were no grounds to challenge the comment contained in the minutes of 2 May 1996. It adds that the said minutes and the fact that the complainant was not heard either by the Selection Board in July 2001 or by the Tribunal have no bearing on the selection procedure that led to the disputed appointments. It points out that the Appeals Committee of the Administrative Council, which is a joint body since Judgment 2341, does not become involved in this type of procedure.

In view of the fact that all the complaints filed by the complainant challenging the appointment of persons other than himself as members of an appeal board have been dismissed and that he has filed no fewer than five complaints raising the same issue since his retirement, the Organisation states that it is now faced with a “personal issue, the

mourning pangs stemming from unrealised ambition”, and that neither the internal appeal boards nor the Tribunal can be deemed the “appropriate forum for such an issue”. It therefore asks the Tribunal to order the complainant to pay damages for abuse of procedure.

D. In his rejoinder the complainant produces annexes indicating that he challenged the appointment of two grade A3 administrators to grade A5 director posts, through internal appeals bearing the references RI/33/06 and RI/68/06, respectively. He points out that, in its arguments in response to the latter appeal, which he filed with three other staff members of the Office, the EPO accepted that he had a cause of action after stating, on the basis of Judgment 1549, that as a retiree he retained an interest in exposing a breach of the appointment procedure which might entitle him to damages. He submits that the Organisation’s position with respect to that appeal is also applicable to the present case. Under the circumstances, the Administrative Council should, in his opinion, have sought the opinion of its Appeals Committee. As it did not do so, he maintains that his right to be heard was not respected.

Furthermore, the complainant asserts that promotion from grade A3 to grade A5 “without spending a single moment at grade A4” breaches the provisions of Article 49(7) of the Service Regulations, which requires at least two years’ service in a grade for promotion to the next higher grade. To convince the Tribunal that this rule is applicable to appointments to director posts, he calls for a stay of proceedings until the cases of the two above-mentioned grade A3 administrators have been “settled”. He explains that directors are appointed by the President of the Office and that, pursuant to Article 11 of the European Patent Convention, members of boards of appeal are appointed by the Administrative Council on a proposal from the President of the Office. As directors are required, under Article 49(10) of the Service Regulations, to possess “the necessary qualifications referred to in paragraphs 7 and 9” of Article 49, the complainant, invoking the principle that similar acts require similar rules, argues that the President should have ensured that the staff members whose appointment he proposed to the Council also

possessed such qualifications. He considers that the practice whereby staff members are treated differently depending on whether the appointing authority is the Council or the President of the Office constitutes a “discriminatory practice tainted with arbitrariness and a misuse of authority”. He adds that the Organisation’s refusal to comply with the Service Regulations left him with no option but to file a large number of appeals, which it let “drag on indefinitely”, thereby resulting in a miscarriage of justice.

E. In its surrejoinder the EPO reiterates its arguments. On the issue of receivability, it submits that the position it adopts in one case does not bind it in another case. It points out that in May 2008, in its additional submissions, it modified its analysis and concluded that appeal RI/68/06 was irreceivable as far as the complainant was concerned. Given the substantial differences between the circumstances of this case and those of the case that led to Judgment 1549, it contends that the complainant cannot validly rely on that judgment in asserting that he has a cause of action.

Furthermore, the Organisation states that there are no grounds for granting his request for a stay of proceedings. It notes that the Tribunal, in Judgment 2040, has already dismissed the complainant’s arguments concerning the interpretation of the various articles referred to in his rejoinder. It argues that he has not established how the selection procedure was tainted with irregularity, nor has he produced evidence of a miscarriage of justice. The EPO maintains its counterclaim.

At the Tribunal’s request, the EPO submitted additional comments in response to the question as to which provision the Administrative Council relied upon in dismissing the internal appeal filed by the complainant on 16 July 2007 without first referring the matter to its Appeals Committee, given that Article 109(1) of the Service Regulations stipulates that, if the Council “considers that a favourable reply cannot be given to the internal appeal, the Appeals Committee [...] shall be convened without delay to deliver an opinion on the matter [and the Council] shall take a decision having regard to this opinion”. The Organisation argues that, notwithstanding

the lack of an explicit provision to that effect in the Service Regulations, the Council was justified in not referring the matter to its Appeals Committee because the Tribunal, in consideration 5 of Judgment 339, stated that it is open to an organisation, if it so wishes, to dispense with the requirement in Article VII of its Statute and that “organisations do not in practice always insist upon it in cases where they are satisfied that the disadvantages of an appeal under the Staff Regulations, i.e. the delay and expense, would be greater than the advantages of the process in a particular case”. It recalls that the complainant had the opportunity on a number of occasions to state his case before the said Appeals Committee and that the Tribunal, in Judgment 2299, held that, since the complaint raised no new issues in relation to those dealt with in the previous judgments concerning the complainant, those judgments could be referred to, as regards both the scope of the Tribunal’s power of review and the examination of the complainant’s pleas.

F. By a letter dated 8 April 2009 the complainant informed the President of the Tribunal that his appeal RI/33/06 had been dismissed and that, as far as he was concerned, appeal RI/68/06 had also been dismissed, adding that the appointments against which these appeals were filed had also been challenged by the staff representatives. As he considered that a decision by the Tribunal to cancel the appointments challenged in those appeals would prove that those he is challenging in the present case are unlawful, he applied for a stay of proceedings pending a ruling by the Tribunal on the lawfulness of the said appointments.

G. In its comments in response to the above-mentioned letter, the Organisation states that the complainant’s application for a stay of proceedings must be dismissed on the basis of the principle that judgments are binding only on the parties.

## CONSIDERATIONS

1. Since 1991 the complainant has applied on several occasions without success for grade A5 posts as a technically qualified member of a board of appeal. These failed attempts to secure appointment to such a post and to the corresponding grade have already given rise to a number of judgments by the Tribunal on previous complaints filed by the complainant.

2. The complainant retired on 1 March 2007. In accordance with his professional status at the end of his career, he has since received a retirement pension calculated on the basis of grade A4(2), step 11.

3. In July 2007, the appointment with effect from 1 June 2007 of a number of grade A3 examiners to appeal board member posts at grade A5 was announced in issue 7-8/07 of the *Gazette*, the internal EPO newsletter.

The complainant, who had previously sought to challenge the possibility of making direct appointments of grade A3 staff members to such posts, filed an internal appeal against the appointments in accordance with the procedure laid down in Articles 106 to 108 of the Service Regulations.

4. At its 111th session, held from 23 to 25 October 2007, the EPO Administrative Council unanimously decided to dismiss the appeal as manifestly irreceivable on the grounds that the complainant had no cause of action. It is this decision, notified in a letter from the Chairman of the Council dated 31 October 2007, that the complainant now impugns before the Tribunal.

The complainant seeks to have his retirement pension calculated on the basis of the highest step of grade A5. He also asks to be awarded at least 5,000 euros in damages for the harm that he claims to have suffered and at least 2,000 euros in respect of costs.



5. The complainant has requested hearings. As the parties have expressed their positions in sufficient detail in their written submissions and the documents produced, the Tribunal does not see fit to grant this request.

6. The Organisation argues that the complaint, like the internal appeal that preceded it, should be dismissed as irreceivable. It contends that the complainant, given his status as a retiree, has no cause of action.

7. It has to be acknowledged that this objection to receivability is well founded.

The facts set out above show that the complainant, who retired on 1 March 2007, could not, by definition, seek to be appointed to one of the posts in question, given that these appointments were to take effect on 1 June 2007, i.e. three months later. Moreover, the appointment of the staff members concerned to those posts obviously had no impact whatsoever on the amount of his retirement pension, which, having been calculated in accordance with the rules in force, on the basis of the complainant's professional status on the date of his retirement, could not have been affected by subsequent events. It follows that the disputed appointments could not have adversely affected the complainant's interests in any way.

8. It is true that the Tribunal's case law as set forth, *inter alia*, in Judgments 1330, 2204 and 2583, does not make a complaint's receivability depend on proving certain injury. It is sufficient that the impugned decision should be liable to violate the rights or safeguards that international civil servants enjoy under the rules applicable to them or the terms of their employment contract. Thus, where a decision is taken, for instance, to appoint a staff member to a particular post, another staff member's interest in challenging such an act does not depend on whether he or she had a relatively good chance of being appointed to the post in question (see, for example, Judgments 1223 and 1272). However, as demonstrated by the same case law, the person concerned must be eligible to occupy the post; otherwise he or

she could not be deemed to be legally affected by the disputed appointment. This condition is clearly not met in the present case, because the complainant could not, on account of his retirement, aspire to be appointed as a member of an appeal board with effect from 1 June 2007 and because the disputed decisions therefore had no impact on his own situation.

9. With a view to countering this objection to receivability, the complainant refers to Judgment 1549, in which the Tribunal upheld the receivability of a complaint filed by an official who criticised the circumstances in which an appointment had been made to a post for which he had applied, even though he had retired in the meantime. The Tribunal held that, although he was obviously no longer eligible to be appointed to the post on the date of the said judgment, he still had an interest in exposing a breach of the appointment procedure which might entitle him to damages. However, it should be emphasised that the official in that case was still an active staff member on the date when the disputed appointment took effect and hence could at the time press a claim to be appointed to the post himself. The organisation's decision had therefore clearly harmed his interests. The present case differs from that precedent precisely because the complainant, who had already retired on the date on which the appointments he is challenging took effect, would on that account have been ineligible for appointment himself. It follows that the disputed decisions caused him no injury whatsoever.

10. In the light of the foregoing considerations, the complainant's claims for redress for the injury allegedly caused by the said appointments must be dismissed.

With regard to the complainant's claim to have his retirement pension recalculated on a different basis pursuant to this judgment, the Tribunal finds that it has no jurisdiction in any event to award him such redress.

It should be noted that his claim for damages is also manifestly unfounded inasmuch as it is again based on a legal argument that the Tribunal has already expressly dismissed in several judgments

delivered on complaints previously filed by the complainant (see in particular Judgments 2040 and 2299).

11. It follows that the complaint must be dismissed without there being any need to rule on the lawfulness of the internal appeal proceedings or to grant the stay of proceedings requested by the complainant in his final submissions.

12. The Organisation, which contends that the complaint constitutes an abuse of process, requests that the complainant be ordered to pay it damages.

Without ruling out, as a matter of principle, the possibility of making such an order against a complainant or, at least, of requiring a complainant to pay costs (see, for instance, Judgments 1884, 1962 and 2211), the Tribunal will avail itself of that possibility only in exceptional situations. Indeed, it is essential that the Tribunal should be open and accessible to international civil servants without the dissuasive and chilling effect of possible adverse awards of that kind.

In the present case, the complaint is both irreceivable for want of a cause of action and manifestly unfounded inasmuch as it is based on arguments that have already been dismissed by the Tribunal in previous judgments and it could certainly be perceived as an abuse of procedure. However, it is to be hoped that the legal consequences that the Tribunal has drawn in this judgment from the complainant's retirement will prevent him from bringing new disputes in the future. The Tribunal therefore sees no need, in the circumstances of the case, to allow the Organisation's counterclaim.

## DECISION

For the above reasons,

The complaint is dismissed, as is the EPO's counterclaim.

In witness of this judgment, adopted on 30 April 2009, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 8 July 2009.

Seydou Ba  
Claude Rouiller  
Patrick Frydman  
Catherine Comtet