Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

F. (No. 16)
v.
EPO

136th Session **Judgment No. 4712**

THE ADMINISTRATIVE TRIBUNAL,

Considering the sixteenth complaint filed by Mr T. F. against the European Patent Organisation (EPO) on 30 April 2021, the EPO's reply of 19 April 2022, the complainant's rejoinder of 18 October 2022 and the EPO's surrejoinder of 24 January 2023;

Considering the application to intervene filed by Mr A. K. on 14 December 2021, the EPO's comments of 14 December 2022, the complainant's additional comments of 5 March 2023 and the EPO's final comments of 21 March 2023;

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 his transposition into a new job group pursuant to the introduction of a new career system.

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. 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. Hence, the grade and step of each employee under the new career system should be determined on the basis of the basic salary applicable 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 the salary resulting from the transposition.

The complainant held grade A3, step 4, on 31 December 2014. By a letter of 30 April 2015, he was notified that, as of 1 July 2015, he was transposed into job group 4 and assigned grade G10, step 3, in the new salary scales, and that his basic salary would remain at the same level. In July 2015, he filed a request for review against that decision alleging, inter alia, that the transposition decision was tainted with breach of acquired rights, arbitrariness which resulted in inequality and discrimination, and lack of respect for his dignity. He argued the decision was also unlawful as it was taken on the basis of decision CA/D 10/14, which was itself flawed. According to him, decision CA/D 10/14 was tainted with several flaws, including improper consultation with the General Consultative Committee (GCC). In addition, the decision violated his acquired rights and legitimate expectations. He added that through the challenge of the transposition letter of 30 April 2015, he also challenged decision CA/D 10/14 and the "subsequent circulars" on which the transposition decision was based. He requested that the status quo ante be restored, or in the alternative that the system be modified so that he would not suffer any material or moral damages.

On 1 September 2015, he was notified that his request for review was rejected as unfounded. Late November 2015, he filed an appeal with the Appeals Committee alleging that the transposition letter caused him material injury, "both financially as well as [regarding his] career progression". He reiterated the requests he made in his request for review, while detailing the reliefs that would allow him not to suffer any further injury.

On 18 November 2020, the enlarged chamber of the Appeals Committee issued its opinion concerning several appeals filed against the new career system, in particular regarding the abolition of the automatic step advancement and the grade transposition. It organised some joint oral hearings, with one concerning the appeal filed by the complainant. The members of the Appeals Committee unanimously stated that the request to quash decision CA/D 10/14 may be examined only in relation to the particular provisions of the regulations which were applied to the complainant and to the adverse effect the regulations may have had on him. The legal situation surrounding the implementation of the new career system, in particular the difference between the entry into force of the reform in January 2015 and the transposition of staff as of July 2015, was unclear; therefore, it considered that appellants were allowed to challenge their payslip, like the complainant did in his fifteenth complaint (see Judgment 4711), or the transposition letter, which is at stake in the present complaint. The majority recommended rejecting the complainant's appeal as unfounded. In its view, decision CA/D 10/14 was lawfully adopted and the individual contested decision was also lawful. It noted in particular that making changes to career structure was part of general employment policy, which an organisation is free to pursue in accordance with its general interest. According to the majority, the reasons invoked for the reform were objectively justifiable, stressing that remedying the phenomenon of overlaps of salaries between different grades was recommended by independent experts. It added that the grades assigned to the appellants during transposition were in line with applicable provisions. The fact that the transposition date of 1 July 2015 did not coincide with the entry into force of the new career system on 1 January 2015 could not be considered as involving a legal flaw or as being irrational. Indeed, additional time was needed to properly transpose all staff and establish the new payslips. It was not convinced that the appellants' "seniority" had to be taken into account for the purposes of their transposition, noting that the concept of "pro-rata" steps did not exist. However, it was within the EPO's discretion to choose different cushioning measures. As to the fact that some staff, like the complainant, were transposed into the same job group or grade as colleagues who prior to the reform were graded below, the majority

noted that the reform combined some grades, which inevitably resulted in eliminating some distinctions. However, that differential treatment regarding the disputed transposition pursued a legitimate purpose and the means used were proportionate.

The minority recommended to uphold the complainant's appeal as founded and to grant him the relief claimed, in particular moral damages for the prejudice resulting from the illegality of the contested decision. According to the minority, the new career system was flawed due to the presence of Vice-Presidents and members of the Management Committee (MAC) on the GCC, the consultative body to which the proposed reform was submitted. It also found that the consultation process of the GCC was not conducted in good faith. The minority considered inter alia that the EPO did not fulfill its duty of care towards its employees as no proper transitional measures protecting employees against sudden and significant adverse changes were established. Hence, the decision not to take any additional "cushioning measures", such as pro-rata step transposition, resulted in an undue hardship for the majority of staff since the basic salary fell between two grades in the new structure. If the difference to the higher step was equal or less than 50 euros, they were assigned to the higher step, otherwise they were assigned to the lower step with guaranteed payment of the difference in salary for as long as the difference existed (the so-called "50-Euro rule"). A subsequent step advancement in the new career system had therefore a different effect. The Appeals Committee unanimously recommended that the complainant be awarded 600 euros in moral damages for the unreasonable length of the internal appeal proceedings.

By a letter of 4 February 2021, the complainant was informed of the Office's decision to follow the recommendations of the majority of the Appeals Committee for the reasons stated in the opinion. Consequently, his appeal was rejected as unfounded. He was however awarded 600 euros in moral damages for the length of the internal procedure and a further 100 euros in moral damages for the time that had elapsed since the deliberations of the Appeals Committee. That is the impugned decision.

The complainant asks the Tribunal to quash the impugned decision of 4 February 2021, decision CA/D 10/14, in particular its Article 56, and new Article 48 of the Service Regulations, as well as "all subsequent and consequential decisions, which are void ab initio". He seeks an award of financial and material damages for the loss of opportunity in his career and salary progression as well as the breach of his legitimate expectations. He also claims moral damages for breach of duty of care, and for procedural inefficiency and the length of the internal appeal procedure, as well as costs.

The EPO asks the Tribunal to reject the complaint as irreceivable to the extent that the complainant seeks the setting aside of aspects of decision CA/D 10/14 that were not applied to him. It considers that the claim for material damages is irreceivable for failure to exhaust internal means of redress as the complainant did not make such claim internally. In addition, according to the EPO, his claim for financial damages should be rejected as too vague. The EPO adds that insofar as he seeks compensation for the same claims in separate proceedings the reliefs claimed cannot be granted. It stresses that he was paid 600 euros for the length of the proceedings, plus an additional 100 euros. Lastly, it asks the Tribunal to reject the complaint as otherwise unfounded. Regarding the claim for costs, the EPO asks the Tribunal to order that the complainant bear all the costs he has incurred in bringing these proceedings.

CONSIDERATIONS

1. The pleas and claims contained in the present complaint are partially identical to those contained in the complainant's fifteenth and nineteenth ones. However, while the facts in each of these three complaints are part of the same continuum of events, the legal issues raised and the decisions impugned are partially discrete. Accordingly, the present complaint will not be joined with the others.

In the three cases, the complainant is, in substance, challenging the introduction of the new career system based on decision CA/D 10/14. The Tribunal has a principle that "the same question cannot be the subject of more than one proceeding between the same parties" (see Judgments 4530, consideration 7, and 3058, consideration 3). It is conceivable that one or more of the complaints could have been dismissed by application of that principle. However, the broad subject matter of each of the complaints is plainly a matter of fundamental importance to the staff of the EPO, including the complainant. In these circumstances, the Tribunal will address each of the complaints individually.

2. The Tribunal will not address the receivability issues raised by the Organisation, including the one concerning the application to intervene of Mr Kampka, since the complaint is unfounded on the merits.

3. Firstly, the Tribunal points out that the scope of the present complaint is the challenge to the transposition letter of 30 April 2015 informing the complainant that he was transposed into a new job group. This decision reflected the transitional provisions for the transposition in the new career system introduced by the general decision CA/D 10/14. The complainant also challenges the general decision to the extent that it introduces a new step advancement system no longer based automatically on seniority (Article 48 of the Service Regulations as amended by the general decision) and establishes transitional provisions (Article 56 of the general decision) which allegedly adversely affect him.

4. A number of the complainant's pleas concern procedural flaws that allegedly occurred at the "elaboration" stage and at the "adoption" stage of decision CA/D 10/14.

All these pleas were also advanced in the same terms in another complaint (the complainant's fifteenth complaint), adjudicated by the Tribunal in Judgment 4711, delivered in public on the same day as the present judgment. In that judgment, the complaint has been dismissed. Based on considerations 5 and 7 of that judgment, the complainant's

pleas advanced in the present complaint alleging procedural flaws are unfounded.

5. By a further plea, the complainant alleges a breach of legitimate expectations; he contends that:

– automatic step advancement had existed since the creation of the Office, for more than forty years; it was therefore a well-established practice, which he expected to continue;
– on the day of his effective transposition in the new career system (1 July 2015) he would have had more than 12 months of cumulative seniority and, under the old system, he would have advanced in step in May 2015;
– his accumulated seniority was reflected in his payslips, thus the EPO gave him a recurring, specific, personal and formal assurance that his accrued seniority would be recognized;
– his accumulated seniority gave him a legitimate expectation that his basic pensionable salary would be higher;
– his seniority would have been taken into account at the time of the transposition so that he would be on an equal footing with his peers, and not transposed at the same grade and step as some more junior colleagues, which was a demotion without reason.

This plea is unfounded.

With regard to another complaint filed by the complainant (his fifteenth complaint), the Tribunal, by Judgment 4711, delivered in public on the same day as the present judgment, held that the new rules on step advancement (no longer based on seniority), enshrined in Article 48 of the Service Regulations as amended by the contested general decision, are lawful and do not breach the complainant's acquired rights. Accordingly, in the present case, no legitimate expectations were breached, as the complainant's expectations were grounded on a rule (step advancement based on seniority) which has been lawfully abolished. The contention that automatic step advancement had existed since the creation of the Office, for more than forty years, and it was therefore a well-established practice, which the complainant expected to

continue, is unfounded: as already said, the automatic step advancement was not based on a practice, but on a rule. In any case, a practice cannot continue to apply when it has been expressly (and lawfully) abolished by a legal provision. In the present case, irrespective of whether the automatic step advancement was grounded on a rule and/or on a practice, it has been lawfully abolished (see Judgment 4274, consideration 19).

In addition, the Tribunal observes that the complainant's previous basic salary was preserved, and not reduced, and even though the complainant lost an automatic step advancement to be accrued in May 2015 according to the former career system, he did not lose the opportunity for a step advancement in 2015, based on the new criteria (performance and expected competencies). Indeed, pursuant to the transitional rules: "[s]tep advancements and normal promotions decided in 2015 on the basis of the new provisions as adopted in the present decision [...] shall be effective as from 1 July 2015" (Article 59(1)). As a result, a step advancement was possible in 2015 based on the new rules, presumably taking into account the Performance Appraisal Report for 2014.

There is no evidence that the transposition in the new career system will compromise his pension rights.

The fact that the complainant was transposed in the same grade and step as some staff members who prior to the reform were graded below him cannot be considered a demotion without reason. The reform combined some grades, which resulted in eliminating some distinctions; this does not appear disproportionate nor discriminatory against the complainant, considering that he was given the proper grade and step and that his previous salary was preserved. The Tribunal has consistently held that the principle of equal treatment requires, on the one hand, that officials in identical or similar situations be subject to the same rules and, on the other, that officials in dissimilar situations be governed by different rules defined so as to take account of this dissimilarity. In the present case, firstly, the complainant is not in an identical or similar situation to that of staff members in different former career paths. Secondly, the Organisation took in due consideration the circumstance that, by combination of some previous career grades and by elimination

of some previous distinctions, staff members having, prior to the reform, different grades and steps have, after the reform, the same grade and step. The former dissimilarity has been taken into account, as the complainant's previous salary was preserved. The different rule which was applied to him was appropriate in view of that dissimilarity (see Judgment 4274, consideration 21, for a similar reasoning in a similar situation).

6. The complainant further contests the so-called "50-Euro rule", a transitional measure enshrined in Article 56(3) of decision CA/D 10/14. Article 56(3) read as follows: "An employee whose basic salary falls between two steps within the same grade in the new salary scales shall be assigned to the higher one, provided that the difference between the employee's basic salary and the basic salary for the next immediate higher step is equal to or less than [...] 50 [euros]. In all other cases, the employee shall be assigned to the lower step." Pursuant to this rule, the complainant, whose basic salary was more than 50 euros lower than the basic salary for the next immediate higher step, was assigned to the lower step.

The complainant contends that this rule is unrealistic, as the difference between the basic salary in the old system and the basic salary for the next immediate higher step in the new system is almost never equivalent to or less than 50 euros. As a result, most of the staff were transposed to a lower level with a lower basic salary. The rule led to an unfair situation, as in the new career system he was aligned with more junior colleagues, in breach of the principle of equal treatment.

This plea is unfounded.

According to the Tribunal's case law, an organisation has wide discretion when altering salary structures and grading systems and classifying officials individually. Decisions on such matters are therefore subject to only limited review by the Tribunal, which will censure them only if they have been taken in breach of a rule of form or procedure, if they are based on an error of fact or law, if some essential fact was overlooked, if clearly mistaken conclusions were drawn from the evidence or if there was misuse of authority (see

Judgment 4274, consideration 5). In the present case, the "50-Euro rule" is neither illogical nor disproportionate, nor tainted by error of fact or law, nor by abuse of authority. It was not unrealistic or inapplicable, since, as a matter of fact, it appears from the record that it was applied to a number of cases. It was justified by the need to avoid that the transposition in the new career system would result in a generalized and automatic passage to a higher step. Such an effect would have been inconsistent with the aim of the reform, which was limiting career progression based only on seniority and not on merit.

7. In his last plea, the complainant alleges a breach of the Organisation's duty of care. This plea was also advanced in the same terms in another complaint (the complainant's fifteenth complaint), adjudicated by the Tribunal in Judgment 4711, delivered in public on the same day as the present judgment. In that judgment, the complaint has been dismissed. Based on consideration 10 of that judgment, the complainant's plea advanced in the present complaint alleging a violation of the duty of care is unfounded.

8. The complainant requests to be awarded moral damages for the alleged undue delay in the internal appeal proceedings. This claim is not supported by specific pleas and allegations. In the present case, the impugned decision has already awarded the complainant 700 euros for the length of the internal appeal procedure, including the time that elapsed following the deliberations of the Appeals Committee. The complainant does not substantiate before the Tribunal that his injury warrants a higher amount. As a result, this claim should be rejected.

9. In conclusion, all the complainant's pleas are unfounded and therefore all his claims should be rejected.

10. Accordingly, Mr K.'s application to intervene will also be dismissed.

DECISION

For the above reasons,

The complaint is dismissed, as is the application to intervene.

In witness of this judgment, adopted on 23 May 2023, Mr Michael F. Moore, President of the Tribunal, Mr Patrick Frydman, Vice-President of the Tribunal, and Ms Rosanna De Nictolis, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered on 7 July 2023 by video recording posted on the Tribunal's Internet page.

MICHAEL F. MOORE

PATRICK FRYDMAN

ROSANNA DE NICTOLIS

DRAŽEN PETROVIĆ