

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

**127th Session**

**Judgment No. 4112**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr O. B. against the European Patent Organisation (EPO) on 12 February 2013, the EPO's reply of 31 July, the complainant's rejoinder of 8 November 2013 and the EPO's surrejoinder of 27 February 2014;

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 contests retroactively his promotions.

The complainant entered the service of the European Patent Office, the EPO's secretariat, in 1984 at grade C4. He was promoted to grade C5 in 1991. In March 1999 he was promoted to grade B2 with retroactive effect from 1 December 1998 and in 2001 he was retroactively placed in grade B3 as of the same date. Lastly, in 2009 the complainant was promoted to grade B4.

By a letter of 6 September 2010 addressed to the President of the Office, the complainant requested that a review of his career be undertaken as from 1999. He argued in substance that by promoting him to the B category with retroactive effect from 1 December 1998, the Office had wrongly denied him the benefit of the provisions of

Circulars Nos. 253 and 257, which came into force in January 1999 and May 2000, respectively, and that, as a result, his career progression had been less favourable than that of employees whose promotion from category C to category B had occurred after his. Should his request not be granted, he asked that his letter be treated as an internal appeal and additionally he claimed compensation for costs and damages. On 5 November 2010 his request was rejected as time-barred and unfounded, and the matter was referred to the Internal Appeals Committee (IAC).

After hearing the parties, on 4 September 2012 the IAC delivered an opinion in which it unanimously found that the appeal was receivable and well founded. It noted that the Service Regulations for permanent employees of the European Patent Office contained no statutory deadline for filing a request for review based on new facts, and assumed that the complainant had gradually become aware of his colleagues' career progression. It recommended granting the complainant's request for a review of his career as from 1999 and reimbursing any reasonable costs incurred by him. By a letter of 15 November 2012, which constitutes the impugned decision, the complainant was informed that, contrary to the IAC's opinion, his appeal was dismissed as irreceivable *ratione temporis*.

The complainant asks the Tribunal to set aside the impugned decision, to re-evaluate his career status as from 1999 and to grant him damages and costs.

The EPO asks the Tribunal to dismiss the complaint as entirely irreceivable *ratione temporis* and, subsidiarily, as unfounded. In its surrejoinder, the EPO claims that the complainant missed the deadline set by the Tribunal for the filing of his rejoinder.

## CONSIDERATIONS

1. The complainant is a member of staff of the EPO. In these proceedings he impugns a decision of the Vice-President of Directorate-General 4 of 15 November 2012 rejecting his internal appeal as irreceivable. In so doing, the Vice-President of Directorate-General 4 did not accept a conclusion of the IAC, in its opinion of 4 September 2012, that the

internal appeal was receivable. In its pleas, the EPO continues to argue that the complainant's complaint is irreceivable because it is time-barred.

2. It is convenient to address the question of receivability of the complaint at the outset as it is a threshold issue. Thus it is necessary to summarise, at this point, only those facts that are relevant to the question of receivability. The complainant held, at the time of his complaint, a position at grade B4, step 9. He commenced employment at the EPO as a technician in 1984 at grade C4. In 1991 he was promoted to grade C5. He was told, in March 1999, that he had been promoted from grade C5, step 11, to grade B2, step 9, with retroactive effect from 1 December 1998. The complainant did not challenge this decision. In July 2001 the complainant (and two other colleagues) sought to have applied to their circumstances Circular No. 257, which related to promotions from category C to category B. In the ultimate result, a decision was taken to promote the complainant to grade B3, step 11, retroactively as of 1 December 1998. Again the complainant did not challenge this decision.

3. On 1 December 2009, the complainant was promoted to grade B4. He did not challenge this decision at the time. Nonetheless, on 6 September 2010, the complainant requested a career review challenging his promotion from grade C5 to grade B2 and the "correction" to grade B3 together with the promotion to grade B4 (collectively, the promotion decisions). In the result, this request became an internal appeal leading to the opinion of the IAC of 4 September 2012 referred to earlier.

4. While effectively accepting, save for one matter, that the appeal was time-barred, the IAC was nonetheless satisfied that it was receivable as a fact or facts of decisive importance had occurred since the promotion decisions were made and, accordingly, time limits should not be strictly applied (the IAC cited Judgment 3002, consideration 14). The fact or facts were that there was a "serious problem" with the career system within the EPO manifesting, in part, by colleagues the complainant had trained gradually getting ahead of him through seniority and the creation of a Harmonization Committee within EPO in 2004 to address the potentially anomalous results and effects of the career system

introduced in 1999. The complainant advances the same argument in resisting the contention of the EPO in these proceedings that the complaint is irreceivable.

5. The approach of the IAC and the complainant involves a misconception about the width of the principle concerning “new facts” which allows for some flexibility with the strict application of time limits. The principle is only engaged when the new fact or facts relate directly to and impact upon the decision which the complainant sought to challenge out of time. In the present case, the operative administrative decisions with direct legal effect were the promotion decisions. The fact or facts identified by the IAC did not relate directly to nor impacted upon the promotion decisions. They were nothing more than facts evidencing an emerging environment concerning and manifesting the inadequacies of the career arrangements then operating in the EPO.

6. The EPO was correct in dismissing the internal appeal as time-barred. In the result, internal means of redress have not been exhausted and the complaint is irreceivable. For this reason, the complaint should be dismissed. It is unnecessary to deal with the possible legal consequences of the complainant’s rejoinder being filed out of time having regard to the complainant’s explanation of why it was out of time.

#### DECISION

For the above reasons,  
The complaint is dismissed.

In witness of this judgment, adopted on 30 October 2018,  
Mr Giuseppe Barbagallo, President of the Tribunal, Mr Michael F. Moore, Judge, and Sir Hugh A. Rawlins, Judge, sign below, as do I, Dražen Petrović, Registrar.

Delivered in public in Geneva on 6 February 2019.

GIUSEPPE BARBAGALLO

MICHAEL F. MOORE

HUGH A. RAWLINS

DRAŽEN PETROVIĆ