Organisation internationale du Travail
Tribunal administratif

International Labour Organization
Administrative Tribunal

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

F. (Nos. 19, 15 and 16)

v.

EPO

(Applications for review)

138th Session **Judgment No. 4888**

THE ADMINISTRATIVE TRIBUNAL,

Considering the applications for review of Judgments 4710, 4711 and 4712 filed by Mr T. F. on 27 September 2023 and corrected on 3 November, the single reply of the European Patent Organisation (EPO) of 21 December 2023, the complainant's rejoinder of 7 February 2024 and the EPO's surrejoinder of 8 March 2024;

Considering Articles II, paragraph 5, and VI, paragraph 1, of the Statute of the Tribunal and Article 6, paragraph 5, of its Rules;

Having examined the written submissions;

CONSIDERATIONS

1. By Judgments 4710, 4711 and 4712, delivered in public on 7 July 2023, the Tribunal dismissed the complainant's nineteenth, fifteenth and sixteenth complaints respectively (and also, in the case of Judgment 4712, an application to intervene made by another staff member), all of which involved challenges to the new career system for staff of the European Patent Office, the EPO's secretariat, which entered into force on 1 January 2015.

The new system, introduced by the Office's Administrative Council decision CA/D 10/14 of 11 December 2014, brought about extensive changes to the structure of employees' grades by establishing

"career paths" and provided that horizontal step advancement would no longer be based on seniority but instead on the assessment of performance and competencies.

In the aforementioned Judgments 4710, 4711 and 4712, the Tribunal dismissed as unfounded the complainant's challenges to the lawfulness of decision CA/D 10/14 itself, the abolition of the former automatic step advancement based on seniority, and his own transposition into a new job group under the reformed grade structure.

By means of three applications for review, each one directed against one of those judgments, the complainant requests the Tribunal to reverse the dismissal of his various claims.

2. In his applications, the complainant makes two "preliminary procedural requests" in relation to the composition of the panel appointed to rule thereon. The first request is that, "for reasons of impartiality and procedural integrity", the panel should not include any judge who participated in the adoption of the judgments under review. The second is that, in light of the complexity of the issues raised by challenges to the new career structure and the importance of those issues to all staff members of the EPO, the applications for review should be heard by five judges, rather than the usual three.

The Tribunal notes first of all that these two requests are incompatible. As the Tribunal consists of seven judges, three of whom sat on the panel which heard the original cases, it would be materially impossible to establish a panel composed of five different judges.

The request for the applications to be heard by an enlarged panel of five judges cannot be granted. Pursuant to Article III, paragraph 5, of its Statute, the Tribunal only sits as an enlarged panel "in exceptional circumstances". The Tribunal, which has sovereign authority in this matter, considers that there are no exceptional circumstances here. The Tribunal is, of course, aware of the sensitivity of the subject-matter of the original complaints and indeed, in the first consideration of each of the judgments in question, underlined that this was "a matter of fundamental importance to the staff of the EPO, including the complainant". However, while the Tribunal considered that, for that

reason, the panel hearing those cases should include both its President and Vice-President, it did not take the view that the nature of the cases warranted the use of an enlarged panel. It would be peculiar, to say the least, to take a different view on that point when examining the present applications for review.

As regards the request for the applications for review to be ruled on by different judges from those who heard the original cases, the Tribunal makes the general observation that the fact that one of its members sat on the panel that delivered a judgment cannot, of itself, be considered to disqualify her or him from ruling on an application for review of that judgment. If that were the case, it would not be possible to hear applications for review of judgments that had been delivered by a plenary panel, or those delivered by an enlarged panel of five judges, because it would not be possible to form a panel able to examine them. In the present case, as already mentioned, both the President and the Vice-President of the Tribunal took part in hearing the original cases. Since it is of basic principle that judging panels must be presided over by one of those two individuals, the complainant's request has been met to the greatest extent possible by the constitution of a panel to hear the applications for review that has a different president from the one who presided over the original complaints and that includes two judges who did not sit on the original panel.

3. The three applications for review relate to judgments which are closely linked, rest on very similar arguments and share common submissions. They will therefore be joined to form the subject of a single judgment.

4. The Tribunal's consistent precedent has it that, pursuant to Article VI of its Statute, its judgments are "final and without appeal" and carry *res judicata* authority. They may be reviewed only in exceptional circumstances and on strictly limited grounds. Under Article 6, paragraph 5, of the Rules of the Tribunal, the only admissible grounds therefor are a failure to take account of material facts, a material error (in other words, a mistaken finding of fact involving no exercise of judgement), an omission to rule on a claim, or the discovery

of new facts on which the complainant was unable to rely in the original proceedings. Moreover, those pleas must be likely to have a bearing on the outcome of the case. On the other hand, pleas of a mistake of law, failure to admit evidence, misinterpretation of the facts or omission to rule on a plea afford no grounds for review (see, for example, Judgments 4705, consideration 2, 4327, consideration 3, 3473, consideration 3, 3452, consideration 2, or 3001, consideration 2).

5. In support of his applications for review, the complainant firstly objects to the assessment carried out by the Tribunal which, in Judgment 4711 – and also in Judgments 4710 and 4712, to the extent that they refer to Judgment 4711 – led to the dismissal of a plea that the Administrative Council unlawfully delegated its powers to the President of the Office in allowing him, in the context of decision CA/D 10/14, to "lay down further terms and conditions for step advancement".

The relevant paragraphs of consideration 7 of Judgment 4711, in which the plea in question was examined, read as follows:

> "[This] plea, regarding the approval of Article 48(2) of the Service Regulations, is unfounded [...]
>
> Article 33(2) of the [European Patent Convention] vests the Administrative Council, inter alia, with the competence to adopt or amend the Service Regulations and to establish the nature of any supplementary benefits and the rules for granting them. The power to adopt the rules cannot be delegated to the President of the Office, but in the present case the Administrative Council did not delegate such power to the President. Article 48 of the Service Regulations, as amended by the contested general decision, in paragraph 1 states: 'Within the budgetary limits available, depending on performance and demonstration of the expected competencies, an advancement of up to two steps in grade may take place every year'. Paragraph 2 adds: 'The appointing authority may lay down further terms and conditions for step advancement'.
>
> Article 48(2) does not authorise the President to establish further rules on step advancement conditions, as it must be interpreted in connection with Article 48(1) and in its framework. The 'further terms and conditions', which are in the power of the President, must be construed as implementing requirements within the financial limit and the requirements of performance and demonstration of the expected competencies, already established in paragraph 1. The President is not entitled to establish requirements other than performance and expected competencies. In the present case, the

> President did not establish a financial ceiling by his own motion, as the budgetary limit was already provided for by Article 48(1). Article 48(2) of the Service Regulations is therefore consistent with Article 10(2)(a) of the [European Patent Convention], pursuant to which the President 'shall take all necessary steps to ensure the functioning of the European Patent Office'. This provision endows the President with wide discretion to choose among different solutions based on the evaluation of the various relevant public and private interests at stake (see Judgment 4316, consideration 12)."

The complainant submits that the Tribunal's finding, contained in that consideration, that the Administrative Council was entitled to provide that certain practical details of the new step advancement system would be determined by the President stemmed from a failure to consider several material facts. By way of example of the material facts which were wrongly overlooked, he cites the determination by the President of yearly quotas limiting the percentage of staff able to benefit from step advancement, frequent changes to the legal framework and the criteria for advancement laid down by Circular No. 364 setting out the applicable guidelines, the alleged removal in 2019 of the link between performance appraisals and step allocation, and the implementation of a method for reviewing the comparative merits of employees.

However, in considering that the provisions of Article 48(2) of the Service Regulations, interpreted in the light of Article 48(1) thereof, were not inconsistent with the provisions of Articles 10 and 33 of the European Patent Convention, the Tribunal carried out an assessment of a legal nature which is not challengeable in the context of an application for review. Furthermore, the arguments contained in the applications for review make it clear that it is, in reality, the assessment itself that is in dispute, rather than the failure to consider material facts. The complainant, who refers to the analysis of the terms and *travaux préparatoires* of the Convention set out in his original complaints, effectively criticises the Tribunal for having "failed to take into account the restrictive meaning of Articles 10 and 33 [of the Convention] as decided by the [EPO] legislator". Interpretation of a text is clearly a matter of law and the meaning given to it by one party cannot be regarded as a "material fact" within the meaning of Article 6, paragraph 5, of the Rules of the Tribunal and the aforementioned case law on the situations in which applications for review may be made.

The Tribunal did not overlook the various facts referred to above which were cited by the complainant, but instead considered that they did nothing to establish that the plea relied on was well-founded. Furthermore, it is impossible to see how the Tribunal could have reached a different conclusion in that regard given that those matters, which involved an alleged breach by the President, following the adoption of decision CA/D 10/14, of the limits on the powers conferred on him by Article 48(2) of the Service Regulations, were in any event irrelevant to the lawfulness of Article 48(2) itself.

6. In a plea subsidiary to the previous one, the complainant submits that the Tribunal "exceeded its mandate by substituting itself for the legislator" in considering that the President was competent to take managerial measures in relation to step advancement. According to the complainant, the conclusion thus reached by the Tribunal stemmed from a failure to take account of the "crucial material fact" that there is a distinction between step advancement and grade promotion for the purposes of Article 10(2)(g) of the Convention, which states that the President is to "decide on [employees'] promotion". He is of the view that the "promotion" referred to in that provision does not include step advancement.

However, quite apart from the fact that a breach by the Tribunal of its own competence does not figure on the exhaustive list of the grounds for review set out in Article 6, paragraph 5, of the Tribunal's Rules and recognised by the aforementioned case law, what the complainant regards as an encroachment on the authority of the Convention's authors is in fact merely an interpretation of the Convention, carried out in order to decide a point of law regarding the application thereof. The interpretation of a text clearly falls within the Tribunal's mandate.

In addition, the plea on an alleged error in the interpretation of Article 10(2) of the Convention concerns an assessment which, again, is of a legal nature and not challengeable in an application for review, because the distinction to be made between the concepts of step advancement and grade promotion for the purposes of the aforementioned Article 10(2)(g) cannot be seen as a "material fact"

within the meaning of the Rules of Tribunal and the aforementioned case law. Furthermore, in consideration 7 of Judgment 4711, reproduced above, the Tribunal's decision to reject the arguments before it was based not on the provisions of Article 10(2)(g) but on Article 10(2)(a), which authorises the President to "take all necessary steps to ensure the functioning of the [...] Office". Therefore, the Tribunal did not in fact carry out any interpretation of Article 10(2)(g) and, in addition, the plea in question is of no avail.

7. Secondly, the complainant objects to the assessment carried out by the Tribunal which, in consideration 8 of Judgment 4711 – and also in Judgment 4710, to the extent that it refers to Judgment 4711 – led to the rejection of his arguments that decision CA/D 10/14 had infringed an acquired right.

In that regard, the complainant submits first of all that, in asserting, at the beginning of consideration 8, that he contended that "the new step advancement system infringed an acquired right", the Tribunal misrepresented his plea, because what he was in fact alleging was that the breach resulted from "the outright abolition of his right to automatic step-advancement based on seniority".

That objection must be rejected for various reasons. It must be emphasised from the outset that the Tribunal's interpretation of a party's written submissions cannot be properly challenged in an application for review (see, in particular, Judgments 4706, consideration 11, and 4705, consideration 11). What is more, the complainant's assertion that the plea in question was misrepresented is inaccurate since, while his submissions did contain references to the "outright abolition" of the right to automatic step advancement based on seniority, the complainant also referred in other passages to the infringement of an acquired right as a result of the changes made to automatic advancement under the new system, regardless of whether those changes were described as an "outright abolition". By way of illustration, the heading of the section of the complainant's arguments dealing with this point in his rejoinders in the proceedings leading to Judgments 4710 and 4711 read as follows: "The change from step advancement based on seniority to step

advancement based on performance violated acquired rights". Lastly, the objection raised is clearly artificial. In claiming that the outright abolition of the automatic step advancement based on seniority infringed his acquired right to benefit therefrom, the complainant was indeed claiming that "the new step advancement system infringed an acquired right", as the Tribunal put it, and there is nothing to suggest that, in examining this alleged infringement, the Tribunal ignored or sought to deny the fact that automatic step advancement based on seniority, in the form in which it previously existed, had been abolished outright.

8. Still on the issue of the alleged breach of an acquired right, the complainant challenges the Tribunal's findings – which were preceded by a reminder of its case law on the matter and an analysis of the reform to the step advancement system in the light of that case law – contained in the last two paragraphs of the aforementioned consideration 8 of Judgment 4711. Those two paragraphs read as follows:

> "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 complainant submits that these findings stemmed from the Tribunal's failure to consider several material facts. By way of example of material facts which were wrongly overlooked in this regard, he cites the effect of the abolition of automatic advancement on the amount of the retirement pension, the determination of yearly quotas, the frequent changes made to Circular No. 364 and the alleged removal in 2019 of

the link between performance and step allocations – the last three of these items having already been discussed in consideration 5 above – together with the establishment of "catch-up mechanisms" and a financial compensation scheme applicable to employees (such as the complainant) who carried out the role of staff representative, which, he claims, demonstrate the drawbacks of the new advancement system. The complainant also recalls that he had already drawn the attention of the Tribunal to the fact that he had lodged other complaints before it to challenge certain annual step advancement exercises, and submits that he had provided figures showing the average number of steps awarded in the years following the reform, in relation both to overall staff and to his personal situation, together with calculations of the financial effects of the new system on employees, which, he argues, were not taken into account.

However, there is nothing to suggest that the Tribunal failed to consider any of the facts set out in the complainant's written submissions. What the complainant is, in reality, objecting to is that those facts did not lead the Tribunal to conclude, in the contested judgments, that the reform to the step advancement system led to the breach of an acquired right, as he maintained. In coming to its conclusion on that point, the Tribunal carried out a legal analysis and an assessment of the facts of the case which cannot be challenged in an application for review.

Admittedly, as the complainant seems to object, the Tribunal did not specifically comment on each of the aforementioned facts in the contested judgments. However, what mattered in establishing whether an acquired right had been infringed was clearly the overall assessment of those facts, and the Tribunal is under no obligation to rule on each of the facts or arguments raised before it in support of a plea – an approach which, in cases such as this one involving very detailed written submissions, would be incompatible with its wish to render judgments of a reasonable length. Furthermore, it must be noted that a failure to provide sufficient reasons is not, in any event, among the grounds for review admitted by Article 6, paragraph 5, of the Rules of the Tribunal and the abovementioned case law.

Lastly, the complainant, who recalls that his complaints were brought as part of a mass complaint process resulting from the introduction of the new career system and that his had been selected to form "lead complaints" for cases of the same type, criticises the Tribunal for failing to take account of facts set out by other staff members – some of whom found themselves in specific situations – in support of their own complaints. However, it was obviously not for the Tribunal to rule, in the contested judgments, on arguments raised in cases other than those on which it was ruling in those judgments; indeed, such a course of action would have constituted an irregularity. The particular facts and arguments relied on by other complainants in connection with their specific situations will be duly examined in the context of the judgments rendered on their own complaints (provided, of course, that those complaints are not dismissed for irreceivability on any other grounds).

9. In the third place, the complainant objects to the Tribunal's response, in consideration 9 of Judgment 4711 and consideration 5 of Judgment 4712, to his arguments that the abolition of automatic step advancement based on seniority infringed his legitimate expectations.

In this regard, the complainant submits first of all that the Tribunal committed a material error in finding that he had raised a plea – which, along with others, was dismissed in the aforementioned considerations – in which he had alleged that the new step advancement system was inconsistent with a "well-established" practice that had existed since the Office was founded. According to the complainant, he had not actually raised a plea to that effect, but had merely made reference, in his complaints, to the minority opinion of the Enlarged Chamber of the Appeals Committee which recommended that his appeals be upheld and asserted that automatic step advancement was indeed based on such a practice.

However, apart from the fact that, as already stated, the Tribunal's interpretation of a party's written submissions cannot be properly challenged in an application for review, such a plea is specious. In his complaint that led to Judgment 4711 (and, in almost identical terms, in

the complaint that led to Judgment 4712), the complainant had stated, in connection with the alleged infringement of his legitimate expectations, that he "recall[ed], as highlighted by the minority of the Enlarged Chamber, that '[t]he automatic step advancement was a feature of the career system of the Office that existed from the foundation of the Office until its abolition by the contested decision; that is for almost forty years' and 'it was therefore at least a well-established practice'". There is no doubt whatsoever that, in relying on an opinion expressed in such terms, the complainant did intend, as the Tribunal considered, to endorse that opinion and to use the abolition of the practice in question as an argument in support of his allegation that the contested reform had infringed his legitimate expectations.

Furthermore, the Tribunal cannot see how the alleged material error was likely to have a bearing on the outcome of the case, which is a requirement under the aforementioned case law for a ground for review to be admissible. Indeed, dismissing a plea which has not actually been raised has the same effect as finding that it was not raised. In that regard, the complainant cannot validly claim that it was because of this alleged material error that the Tribunal dismissed his plea of an infringement of legitimate expectations in its entirety, while he also maintained that the infringement resulted from the amendment to Article 48 of the Service Regulations itself. In the aforementioned consideration 9 of Judgment 4711 (the reasoning for which was, in essence, reiterated in Judgment 4712), the Tribunal, having noted that "it [was] not appropriate to raise an issue of legitimate expectations based on practice, as in the present case the previous automatic step advancement was not based on a practice, but instead on an express Service Regulation (former Article 48)", found that "[t]hus, in this case, the issue of the alleged infringement of legitimate expectations is not separate, in fact, from the one regarding the breach of acquired rights" and "[t]herefore" dismissed that plea "for the same reasons as those given [...] concerning the issue of acquired rights". The plea of an infringement of legitimate expectations was therefore also examined to the extent that it rested specifically on the amendment of that provision of the Service Regulations itself. Lastly, although the complainant also objects to the fact that, in this case, the Tribunal equated the

infringement of legitimate expectations with the breach of acquired rights, that is a legal consideration which may not be properly challenged in an application for review.

10. Still on the issue of the alleged infringement of his legitimate expectations, the complainant challenges the Tribunal's findings contained in the last two paragraphs of the aforementioned consideration 9 of Judgment 4711. These paragraphs read as follows:

> "The further contention that the new step advancement mechanism lacks transparency, foreseeability and stability, is unproven and unsubstantiated. The mere fact that step advancements are based on performance does not render them arbitrary or not transparent. The reference made by Article 48(1) to performance and expected competencies as requirements for step advancements entails that the periodic step advancements must be based on a performance appraisal system, established prior to the periodic specific assessment for step advancement. One would expect that the eligibility criteria for step advancements would be established in advance so that staff members are placed in a situation to know the requirements and to discharge their obligations accordingly. Article 48(2), in vesting the President with the power to establish terms and conditions, requires that the President clarify in advance, by means of implementing decisions, the criteria for assessing performance and expected competencies in order to achieve the step advancement.
>
> As to the budgetary constraint, it is a natural limit in any organisation, and it does not make the step advancement unforeseeable."

The complainant submits that these findings of the Tribunal stemmed from a failure to consider several material facts. By way of example of such facts which were wrongly overlooked, he cites, once again, the alleged removal in 2019 of the link between performance and step allocations together with the frequent changes made to Circular No. 364, and contends that the Tribunal failed to consider "the numerous facts demonstrating that the system was arbitrary, unpredictable and opaque".

However, here again, there is nothing to suggest that the Tribunal overlooked any of these various facts. It simply considered that they did not establish that the plea relied on was well-founded. In so doing, the Tribunal – which, as already mentioned above, was under no obligation to rule specifically on each of the facts relied on before it – carried out

a legal analysis and an assessment of those facts, together with other facts apparent from the file, which cannot be challenged in an application for review.

11. The complainant objects to the Tribunal's finding that, in his words, "the President established 'in advance' the requirements and criteria for the reward allocation", which, he argues, is contradicted by the facts on which he relied. However, it must be noted that this plea rests, in any event, on a misreading of the contested judgments, since the Tribunal did not make such a finding. In the aforementioned penultimate paragraph of consideration 9 of Judgment 4711, the Tribunal simply stated in that regard that "[o]ne would expect that the eligibility criteria for step advancements would be established in advance so that staff members are placed in a situation to know the requirements and to discharge their obligations accordingly" and that "Article 48(2) [...] requires that the President clarify in advance, by means of implementing decisions, the criteria for assessing performance and expected competencies in order to achieve the step advancement". In so doing, the Tribunal confirmed that it was for the President to determine the relevant criteria in advance, but it did not decide whether the President had actually complied with that requirement. This plea is therefore of no avail.

Furthermore, the allegations made by the complainant in the original proceedings that the step award criteria had not in fact been established in advance of the annual rewards exercises carried out under the new system – and, in particular, the 2015 exercise, to which the complainant refers more specifically to this effect in his applications for review – were themselves of no avail. That matter would, in any event, have no bearing on the lawfulness of the new advancement system as such. In reality, even if those allegations were founded, their only relevance would have been within the context of a challenge made to the results of the annual rewards exercises themselves.

12. In the fourth and last place, the complainant submits that the Tribunal committed a material error in Judgment 4711 – and also in Judgment 4710, to the extent that it refers to Judgment 4711 –

regarding the existence of transitional measures concerning accrued seniority for the purposes of step advancement.

In this regard, the complainant objects to the following finding made by the Tribunal in consideration 10 of Judgment 4711, which examined a plea that the EPO had failed in its duty of care: "The transitional measures included in the reform of the career system fall within the discretion of the Organisation, do not appear unreasonable and cannot therefore be annulled by the Tribunal."

According to the complainant, the Tribunal's reference to transitional measures stemmed from a material error since decision CA/D 10/14 made no reference to accrued seniority "between 2014 and 2015" or to step advancements that would normally have been due under the previous system for the period from January to June 2015. He submits that it is precisely the lack of transitional measures in this regard that constituted, according to his argument before the Tribunal, the breach of the duty of care of which he complained.

However, the Tribunal notes that the aforementioned finding related generally to "[t]he transitional measures included in the reform of the career system", assessed as a whole, and not specifically to any measures relating to step advancement based on seniority, such as those alluded to by the complainant. Furthermore, it must be noted that the question of step advancement in 2015 was dealt with by a transitional measure in Article 59(1) of decision CA/D 10/14, as the Tribunal recalled in consideration 5 of Judgment 4712. Lastly, while it is true that, according to the wording of the provision in question, step advancement for 2015 was to be decided on the basis of the new rules, the Tribunal did indeed rule on the question of the lack of a transitional measure for step advancement based on seniority, as wished by the complainant, since consideration 10 of Judgment 4711 ended with the following sentence (which, in these applications for review, is omitted from the quotation of that consideration): "In any case, it is not within the Tribunal's purview to impose different transitional measures."

The plea that a material error was committed in this regard is therefore completely devoid of merit.

13. It follows from the foregoing that the applications for review filed by the complainant, in what is clearly just an attempt to relitigate issues already settled by the Tribunal in Judgments 4710, 4711 and 4712, must be dismissed.

14. The complainant asks that the EPO be ordered to pay him symbolic damages for the injury caused to him by a sentence in the EPO's reply, in connection with his role of staff representative, which he perceives as a "threat". However, the Tribunal considers that, while the sentence in question is admittedly somewhat inappropriate, it cannot be regarded as being intended as a threat. This claim will therefore, in any event, be dismissed, as will the claims for costs contained in the applications for review.

DECISION

For the above reasons,

The applications for review are dismissed.

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