

## SEVENTY-THIRD SESSION

### *In re* KILLMISTER

#### Judgment 1170

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. John Michael Killmister against the European Patent Organisation (EPO) on 30 April 1991 and corrected on 22 August, the EPO's reply of 11 November 1991, the complainant's rejoinder of 21 February 1992 and the EPO's surrejoinder of 27 March 1992;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 49(7) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. The complainant, a British subject born in 1930, was employed by the EPO at its General Directorate 2, in Munich, as a principal examiner at grade A4 from 1982 until he retired in November 1991. His staff reports for 1982 and 1983 contained general ratings of 3 ("good"). His reports for 1984, 1985 and 1986-87, which were in a simplified form, gave no general ratings. He objected to his staff report for 1988 which was again in the full version, on the grounds that the statistical reckoning of his output had been flawed.

In December 1988 the Administrative Council of the EPO decided to make a new grade, A4(2), to reward especially deserving staff members thwarted of promotion for want of enough A5 posts to go round. By a circular of 17 October 1989 the Principal Director of Personnel announced that a promotion board would advise the President of the Office on the promotion to A4(2) of staff who had reached the last step in A4 and whose latest general ratings were "very good" or "excellent".

The Administration put the complainant's name to the Promotion Board for 1989. At the Board's instance the complainant's supervisors signed on 18 October 1989 a supplementary report on his performance from 1 January to 30 September 1989. It described the quality of his work as "above average" and gave him a "good" general rating, although the reporting officer added that his performance bordered on 2 ("very good"). In written comments he attributed the "good" rating, which did not satisfy him, to the same "deficiencies in the statistical system" he had objected to in the context of his report for 1988. The Promotion Board did not recommend promoting him to A4(2) and he was not promoted.

By letter of 6 April 1990 he asked the President to review the decision not to promote him to the new grade. On 23 May the Principal Director of Personnel told him that he did not qualify. He confirmed his intention of appealing and so his case was put to the Appeals Committee on 6 June 1990. In a report of 15 January 1991 the Committee recommended rejecting it and by a letter of 15 February 1991, the decision the complainant impugns, the Principal Director of Personnel told him that the President had done so.

B. The complainant submits that the decision to refuse him promotion to A4(2) was flawed. By basing it on a method of reckoning output that gives too much credit for easy work the President drew a mistaken conclusion from the facts. He also overlooked the fact that though the complainant chose to have simplified reports he did so only on condition "that it did not disqualify" him for promotion: promotion to A4(2) depends on general ratings, which such reports do not give. The only full report the Promotion Board might have turned to was the 1988 one, but it has never become final. The complainant had for years carried out the duties that now belong to the higher grade, and the only reason why he failed to meet the criteria for promotion was that they are "unjust and invalid": what matters is not ability, but general ratings. The statistical method of measuring output is "discriminatory". Patent applications filed in English take much longer to process than those in other languages. Though the competent Vice-President of the Office acknowledged the need for change some years ago the Administration has done nothing about it.

He seeks the quashing of the impugned decision.

C. In its reply the Organisation submits that the impugned decision is lawful. The complainant has only himself to blame for the delay in completing his 1988 report. As late as September 1990 he stated in section X of that report that "The procedure under C4 [conciliation proceedings] would not appear appropriate to the nature of the objections I have raised". How then were his objections to be considered?

It was not for the Promotion Board to look into his charges of unfair assessment. The proper procedure for raising such matters is for the staff member to challenge a report or the ratings therein. The complainant was not the only official to opt for simplified reports. To make up for the lack of a final report for 1988 the Promotion Board called for a supplementary report on his performance in 1989. The general rating in that report, which he did not challenge, is only "good".

Since he did not meet the conditions for promotion announced in the circular of 17 October 1989, the Board's recommendation and the President's decision were proper.

D. In his rejoinder the complainant contends that the EPO has failed to address the substantive issues, which are the flaws in the reporting system as he described them in his comments on his 1988 report. It was wrong to give the Promotion Board the report without those comments. He enlarges on the reasons why his promotion was warranted. By holding up his case until he had retired the EPO caused him "inconvenience" for which he seeks "financial recompense".

E. In its surrejoinder the Organisation observes that there is no new argument in the complainant's rejoinder. Even if he had had full reports for years before 1988 with "very good" general ratings he still would not have qualified for promotion to A4(2) because his latest ratings were not "very good" or "excellent".

#### CONSIDERATIONS:

1. By his final decision of 15 February 1991 the President of the European Patent Office confirmed a decision not to promote the complainant, a former principal examiner of patents employed at General Directorate 2, in Munich, from grade A4 to a newly created grade known as A4(2). The material issue is whether that decision was lawful.

Article 49(7) of the EPO Service Regulations says that "Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them".

The purpose of the Organisation's Administrative Council in deciding in December 1988 to create grade A4(2) was to reward staff who had given evidence of special merit but who for want of posts at A5 could not be promoted to that higher grade. The question of promotion to the new grade first arose with the issue of a circular of 17 October 1989 by the Principal Director of Personnel on the President's behalf. The circular said that a promotion board was to advise the President on the promotion to A4(2) of anyone who had reached the top of A4 and whose general ratings in his latest staff reports were "very good" or "excellent". The complainant's name was accordingly referred to the Promotion Board for 1989.

2. The Promotion Board was bound to apply the criteria laid down in the circular and had no discretion to discard any of them.

The complainant did meet the first of the two criteria in that he had at the material time reached the last step in A4. But difficulty arose over the second one. His staff reports for 1982 and 1983 had given him general ratings of 3, or "good". For 1984 he had what his supervisor called an "informal" report that gave him no general rating. For 1985 and again for 1986-87 he was given, with his consent, reports in a shorter, or "simplified", form which again did not contain any general rating. Such reports have been allowed since 1982 for anyone over the age of 50.

When the Promotion Board took up the complainant's case the President of the Office had not yet endorsed his report for 1988, the Administration believing that he had applied for conciliation over that report under what is known as the C4 procedure. The Board asked for an ad hoc report on his performance. On 18 October 1989 his supervisor accordingly signed a "supplementary report" on his performance from 1 January to 30 September 1989, and that was the latest report to hand. Although the reporting officer thought the quality of work "above average", he gave only a "good" general rating. And though he commented "Overall performance is near the borderline to

`very good"', the countersigning officer wrote: "Level `good' maintained". In comments on the report the complainant blamed the lower general rating on the same "deficiencies in the statistical system" as those he had objected to in the context of his 1988 report.

The Promotion Board having concluded in the light of his staff reports that he did not qualify for A4(2), the President decided not to promote him to that grade and that decision was confirmed, as was said in 1 above, after he had gone through the appeal procedure.

Although he retired in November 1991, he is pressing his claim on the grounds that promotion to A4(2) would, among other things, put up the amount of his retirement pension.

3. His first plea is that the Promotion Board ought to have had at its disposal the text of his full staff report for 1988.

The reason why it did not was that the text was not yet final. In September 1989 he challenged in writing the ratings in that report. The reporting officers having confirmed them, he ought to have made it quite plain whether or not he was applying for conciliation. Instead he merely wrote: "The procedure under C4 would not appear appropriate to the nature of the objections I have raised ...". Because of the doubt about what he wanted, which, it appears, is not resolved yet, it was only reasonable of the EPO not to treat the report as final.

4. His second objection is that on his performance in the previous three years the Promotion Board had before it only the simplified reports, which did not give general ratings.

Though such a promotion board will ordinarily take just the staff reports submitted to it, it may draw on other information as well. That is why in the complainant's case, to complete the material at its disposal, it asked his supervisors to provide the "supplementary report" on his performance in 1989. That report shows that, though his work was above average in quality, other features of his performance warranted only a "good" rating, and so his general rating was again only "good". Since he has not formally challenged it, it must stand.

5. Thirdly, he contends that the method of reckoning a patent examiner's output is to the detriment of someone whose mother tongue is English and indeed denied him the "very good" general rating he needed in his 1988 report to qualify for the promotion.

The method is not a matter for the Promotion Board; else it would find itself revising ratings in staff reports. In point of fact there is nothing discriminatory about the method: it applies to all examiners alike in General Directorate 2 and the Tribunal finds no reason to question the Organisation's assertion that it makes proper allowance, by means of a "language coefficient", for the language in which patent applications are framed. Be that as it may, if the complainant objected to the reckoning of his own output the proper course was for him to challenge his staff report and the ratings it contained. He did not do so.

6. Since all three of his pleas fail the impugned decision is upheld.

DECISION:

For the above reasons,

The complaint is dismissed. In witness of this judgment Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 15 July 1992.

Jacques Ducoux  
Mohamed Suffian  
E. Razafindralambo  
A.B. Gardner

