

EIGHTIETH SESSION

***In re* PARY (No. 4)**

Judgment 1500

THE ADMINISTRATIVE TRIBUNAL,

Considering the fourth complaint filed by Mr. Lazaro Pary against the World Intellectual Property Organization (WIPO) on 8 February 1995 and corrected on 8 March, WIPO's reply of 14 April, the complainant's rejoinder of 18 May and the Organization's surrejoinder of 20 June 1995;

Considering Articles II, paragraph 5, and VII, paragraph 2, of the Statute of the Tribunal and Articles 4, paragraph 2, and 6, paragraphs 1 and 2, of its Rules;

Having examined the written evidence and disallowed the complainant's application for hearings;

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

A. The complainant's career in WIPO is summed up under A in Judgment 1179 on his first complaint. At the time material to this case he was at step 11 in grade G.3.

By an internal memorandum of 21 January 1991 to the Legal Adviser the Director General of WIPO set out the criteria for the grant of personal promotion. An employee who had been in the same grade for ten years was to qualify for such promotion provided that performance had been satisfactory and employment had never been for less than full time in the ten years. The Director General might allow exceptions in some cases.

On 18 February 1994 the complainant wrote the Director General a letter headed "Long-service step increase" and claiming promotion under the above rules. He pointed out that since 1992 he had been at the same step in his grade and had already "gone beyond the top seniority step" prescribed for that grade in the salary scales of the United Nations common system, to which the Organization belongs. He pleaded breach of Staff Regulation 3.4. In a letter of 22 February the acting head of the Personnel Division rejected his claim, citing Regulation 3.4 bis:

"Staff members in the General Service category, who have completed at least twenty years of satisfactory service with the International Bureau and who have been at the top step of their grade for at least five years, shall be eligible to receive one additional step ..."

In a letter of 29 March 1994 to the Director General the complainant expressed the view that the reply betrayed misunderstanding of his claim to promotion, which rested on the memorandum of 21 January 1991, not on Regulation 3.4 bis: he wanted a higher grade, not just a higher step.

By a memorandum of 5 May 1994 the head of the Personnel Division upheld the earlier decision. He observed that the complainant failed anyway to qualify for promotion under the memorandum of 21 January 1991; though he had held grade G.3 for ten years the "reservations" in his appraisal reports of 17 October 1985 and 19 November 1990 disqualified him for personal promotion.

On 6 June 1994 he lodged an appeal with the Appeal Board asking for a survey to be made of all personal promotions at WIPO and for the grant of such promotion to himself in keeping with the memorandum. In its report of 3 November the Board rejected his appeal and recommended upholding the decision of 5 May 1994. The Director General notified rejection to him in a letter of 8 November 1994, the decision he is impugning.

B. The complainant sees discrimination in the refusal of personal promotion: many in like case got it.

He challenges the lawfulness of the memorandum of 21 January 1991. WIPO has never made it known to the staff at large: that is at odds with precedents that say a text will not apply unless published.

There were procedural flaws and misuse of authority in the entry of "reservations" in his performance reports for 1985 and 1990. The Organization offered him transfer to another unit provided he would not comment on the report for 1985; and as for the one for 1990, there were facts that the Appeal Board overlooked.

He asks the Tribunal to quash the impugned decision, order the Director General to grant him personal promotion as from 1 December 1993, and award him six months' pay in moral damages and 15,000 Swiss francs in costs.

C. In its reply WIPO contends that the complaint is irreceivable. In its submission the complaint form which the Registrar received on 8 February 1995 did not amount to a "complaint" within the meaning of Article VII(2) of the Tribunal's Statute and Article 4(2) of its Rules. Only after 10 February, when the Registrar asked him to "correct his complaint", did he file it; and though he identified in the complaint form the decision he was impugning he did not set out the facts or the pleas he meant to rely on. To be treated as a complaint the papers filed must explain the cause of action and the supporting pleas and they must be entered in time.

In subsidiary argument on the merits the defendant submits that it observed the criteria in the memorandum of 21 January 1991 for the grant of personal promotion. Though the complainant had the required ten years' service some of his appraisal reports in the material period described his performance as "satisfactory with reservations" and so disqualified him even for exceptional personal promotion. He was free to comment and did comment on the one dated 19 November 1990. Besides, it is odd of him to challenge the lawfulness of the very text on which he rests his claim to promotion.

He was not discriminated against: only staff members with satisfactory reports have had personal promotion.

To qualify for an extra step increase under Regulation 3.4 bis an employee must have twenty years' satisfactory service and have spent no fewer than five at the top step of the grade. The complainant had not completed twenty years' service. He can still get ahead at WIPO.

D. The complainant rejoins that there is no provision of the Tribunal's Statute or Rules which says that the mere filing of a complaint form will not do to lodge a complaint. The Registrar gave him leave to complete his submissions and he did so within the thirty-day time limit set in the Rules.

He cites the case of another official who had no better performance reports and did get personal promotion. WIPO has shown him hostility and victimised him for his "identity" and beliefs.

E. WIPO presses its pleas in its surrejoinder. In its submission the case the complainant cites is immaterial because the other employee had had satisfactory reports for the last five years and so qualified for personal promotion on exceptional grounds. The Organization denies discriminating against the complainant on the grounds of nationality or beliefs, a charge for which he offers not a jot of evidence.

CONSIDERATIONS:

Receivability

1. Article VII(2) of the Tribunal's Statute says that a complaint must be filed within ninety days after the complainant had notice of the impugned decision; Article 6(1) of the Rules sets out the requirements of form; and 6(2) says that if not satisfied that the complaint meets those requirements the Registrar shall call upon the complainant to correct it within thirty days. The Rules do not say that all the formal requirements must be met by the date of filing.

2. The complainant filed within the time limit in the Statute the complaint form provided for in the schedule to the Rules. The entries sufficed to identify the decision he was impugning and the relief he was claiming. The registering of the complaint and the correcting of it within the time limit were in line with the Rules. Since the complaint was lodged in time the Organization's objection to receivability fails.

The merits

3. The complainant is claiming personal promotion under a memorandum which the Director General signed on 21 January 1991 and which reads:

"In principle, personal promotion will be granted to an employee who has been in the same grade for ten years, provided

(i) that, during those ten years, none of the performance reports contains 'unsatisfactory' or 'satisfactory with reservations' annotations and

(ii) that, during no part of the ten years, was the employee on less than full time.

An exception to this principle may be envisaged if, during the second half of the ten-year period, (i) all performance reports had nothing but 'satisfactory' annotations and (ii) the employee was full time. If these two conditions are fulfilled, at the end of the 10-year period, the case should be brought to the attention of the Director General who will then decide whether a personal promotion should be granted. His decision will be based on a general assessment of the employee's performance and the expected performance of the employee in the future. If the Director General decided not to make an exception to the principle, the case should be brought again to his attention at the end of the 12th year in the same grade if, during the 11th and 12th years, all the performance reports contained nothing but satisfactory annotations and the incumbent continued to be full time during those two years."

4. Personal promotion is not the same as advancement within the grade. Advancement is covered by Staff Regulation 3.4 and consists in rising by steps: any staff member qualifies for it who meets the conditions of seniority and "satisfactory service". Personal promotion means rising in grade without any change in duties and is a benefit that the Director General may bestow at discretion. He does so only in "exceptional circumstances" to reward someone for services of a quality higher than that ordinarily expected of the holder of the post.

5. Precedent has it that a discretionary decision is subject to no more than limited review. As the Tribunal said, for example, in Judgment 1179 on Mr. Pary's first complaint and in Judgment 1411 (in re Bidaud), it will set the decision aside only if it shows a formal or procedural flaw, or a mistake of fact or of law, or if some essential fact was overlooked, or if it was ultra vires, or if there was misuse of authority, or if an obviously wrong conclusion was drawn from the evidence.

6. The Director General made no improper exercise of his discretion in making rules about the grant of personal promotion. He thereby afforded the staff a safeguard of equal treatment.

7. Nor did the Director General misuse his discretion in applying the rules in this case. A report dated 17 October 1985 on the complainant's performance described it as "satisfactory with the following reservations: the accuracy and presentation of typing and assembly tasks are below par and he must bring them up to scratch". Again, his report of 19 November 1990 said his conduct was "satisfactory with the following reservations: Mr. Pary does not readily obey his supervisors' instructions". The last remark is the more telling in that the fault imputed to him is an objective finding, not a matter of assessment.

8. The complainant pleads that he has been discriminated against and that the Director General's decision shows formal flaws and misuse of authority.

9. The facts show no breach of equal treatment. There is no evidence to suggest that anyone else who failed to meet the requirements of the memorandum got personal promotion. The cases the complainant cited in the internal proceedings disclose no departure from those requirements. In the rejoinder he puts to the Tribunal he does cite yet another case, but the Organization says he is mistaken. Since he has failed to discharge the burden of proof his plea fails.

10. As for his charge of unfair treatment in his career in general, he neither identifies any act of discrimination by the Organization nor shows in what way and for what reasons it may, in his view, have discriminated against him. The plea fails because it is not substantiated.

11. He contends that in applying the memorandum of 21 January 1991 to his case the Organization was free to disregard the comments in his appraisal reports because they are tainted with procedural flaws and misuse of authority. All that need be said on that score is that since the report of 19 November 1990 described his performance as merely "satisfactory with ... reservations", he failed to qualify for personal promotion because he did not meet the requirements of the memorandum. Judgment 1179, which dismissed his first complaint, upheld that report as lawful; so the issue is res judicata and not now open to appeal. He cannot properly impute "malice

aforethought" to the reporting officer because he cites no fact he could not have relied on in his earlier complaint and which might afford valid grounds for review of Judgment 1179.

12. In the complainant's submission the Director General was misled by a "draft report" dated 27 September 1990 in his personnel file which described his performance as "unsatisfactory" and was therefore less favourable than the one written on 19 November 1990. But there is no reason to suppose that that text had any effect whatever on the impugned decision.

13. Lastly, he argues that the memorandum of 21 January 1991 is unlawful because it was not given the sort of publication that he says the case law and several international instruments required. But he did have access to the memorandum since he asked the Director General in his letter of 18 February 1994 to apply it in his favour. So lack of wider publication caused him no injury and affords no reason for declaring the memorandum null and void, the less so since the criteria it sets are objective and the Director General properly applied them in this instance.

14. The conclusion is that the complainant's pleas are devoid of merit and his complaint cannot succeed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 1 February 1996.

(Signed)

William Douglas
Mella Carroll
Egli
A.B. Gardner