

EIGHTY-THIRD SESSION

In re Cottet

Judgment 1670

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Miss Françoise Cottet against the European Patent Organisation (EPO) on 14 June 1996 and corrected on 8 July, the EPO's reply of 2 October, the complainant's rejoinder of 7 November and the Organisation's surrejoinder of 13 December 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which neither party has applied for;

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

A. Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat, is in Munich. Its main function is the substantive examination of applications for patents. At the material time the complainant, who is French, was an examiner in Munich at grade A2 and she had been since 1988.

On 16 March 1992 the Vice-President in charge of DG2 published a "Note to all examining staff concerning the reporting period 1992/1993". It explained what was meant by an examiner's "fair contribution" to production.

A note from the President of the Office to the chairman of the Promotion Board was published in the EPO *Gazette* of 18 July 1994. It set forth guidelines for drawing up lists of candidates for promotion in 1994 and said:

"The Promotion Boards should be reminded that merit must be considered as the most determining factor in anyone's career and a 'record' can normally only refer to a performance during a period of time much longer than the period covered by the last report."

To qualify for promotion from A2 to A3 someone with a "good" rating of performance was required to have eight years' reckonable experience.

The complainant's performance reports for 1991, 1992 and 1993 gave her a "good" rating and she had a total of eight years' reckonable experience by 1 April 1994.

The list of promotions from A2 to A3 was posted up on 5 August 1994 and published in the *Gazette* of 12 September. The complainant's name was not on it. On 19 October 1994 she lodged an appeal with the President of the Office. On 3 August 1995 the Appeals Committee recommended allowing the appeal by sending the case back to the Promotion Board with instructions to draw up a complete list of those who qualified for promotion in 1994.

The Director of Staff Policy informed the complainant by a letter of 18 October 1995 that her case was to be sent back to the 1994 Promotion Board for that purpose. The Board drew up a new list and this time her name was on it. But the Director of Personnel Management informed her in a letter of 19 March 1996 that the President had decided that it would be premature to promote her to grade A3 in 1994. She challenges the decision on the merits. She says that it was taken on 18 December 1995 but she got notice of it only on 19 March 1996.

B. The complainant submits that she met the criteria for promotion published in the *Gazette* of 18 July 1994: the rating of her performance was "good" and she had eight years' experience. She argues that the Promotion Board based its evaluation of her case on the criterion of "fair contribution" was not one of the

criteria for promotion published in the *Gazette* of 18 July 1994.

She asks the Tribunal to order her promotion to grade A3 as from 1 June 1994.

C. In its reply the Organisation asks the Tribunal to join the complaint with that of Mrs. Malika Weaver.

Citing the case law, it points out that the President has discretion in choosing the candidates to be promoted. It submits that promotion is not, as the complainant and the Appeals Committee believe, a foregone conclusion once the criteria set out in the note of 18 July 1994 are met. In his introduction to the note and in accordance with the Administrative Council's policy the President stressed the importance of merit. So there was every reason for examiners with eight years' experience and a "good" rating who did fulfil the criterion of "fair contribution" to be given precedence over those who had the same experience and rating but a lower output. "Fair contribution" is relevant only where a choice has to be made between candidates who meet the minimum conditions. So it is not a new requirement for promotion but an objective means of determining merit, which is an acknowledged criterion for promotion.

The "General Guidelines on Reporting", which were issued in February 1992 and are still valid, allow drawing up "special guidelines" for certain Directorates and types of functions.

D. In her rejoinder the complainant objects to joinder and presses her claims.

E. In its surrejoinder the Organisation presses its pleas. It points out that she was promoted to grade A3 from 1 April 1995.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Organisation (EPO) on 1 October 1988 as an examiner of patents at grade A2. She found that her name was not on the list of permanent employees promoted to grade A3 in 1994. In a letter which she wrote on 10 August 1994 to the Director of Personnel Administration she asked him to "explain the outcome of the meeting of the Promotion Board" for 1994. In a memorandum of 11 August in reply the Director set out the rules on promotion and said that her fulfilling the minimum qualifications did not guarantee promotion since it was not a foregone conclusion.

2. By a letter of 19 October 1994 the complainant filed an internal appeal with the President of the European Patent Office seeking promotion to grade A3 "as from the date by which she had a total of eight years' reckonable experience". She argued that she met the conditions for promotion to A3 that were set out "in the manual for examiners" and reproduced in the EPO *Gazette* No. 14/94 of 18 July 1994.

3. In a letter of 8 December 1994 the Director of Staff Policy told her that the President had referred her case to the Appeals Committee. The Organisation submitted its brief to the Committee on 30 May 1995. In its report of 3 August 1995 the Committee recommended allowing the appeal and sending her case back to the Promotion Board with instructions to draw up a complete list of employees who qualified for promotion in 1994 and to forward that list to the President for a new decision on the promotion of the complainant to A3 in 1994. The Committee referred to the criterion of "fair contribution" as defined in a note signed by the Vice-President in charge of Directorate-General 2 (DG2) on 16 March 1992 and approved by the Local Advisory Committee. It took the view that that criterion was a further condition for promotion to A3 which had not been published in the *Gazette* of 18 July 1994.

4. In a letter of 18 October 1995 the Director of Staff Policy informed the complainant (a) that the President was of the opinion that "fair contribution" had not been treated as an additional condition for promotion to A3 and was only one "element" to be taken into account in assessing merit for promotion; and (b) that the President would instruct the Promotion Board for 1994 to complete the list of staff who qualified for promotion to A3 in that year. Once he had the complete list he would take a new decision on the complainant's promotion.

5. The Promotion Board drew up the complete list and put it to the President, who decided that it was premature to promote the complainant to A3 for 1994. The Director of Personnel Management so informed the complainant in a letter of 19 March 1996.

6. The complainant was promoted to A3 as from 1 April 1995.

The defendant's application for joinder

7. The defendant applies for joinder of this case with the complaint filed by Mrs. Malika Weaver on 18 June 1996 on the grounds that the conditions for joinder are met. Both complainants are examiners of patents and seek promotion to A3 as from 1994. They rest their claims on the same pleas, namely that they qualified for promotion and it was unlawful to make "fair contribution" a further condition.

8. It is true that the conditions for joinder set out in the case law are met: see Judgments 656 (*in re Benussi and others*), 657 (*in re Metten and others*) and 663 (*in re Kern Nos. 2, 3, 4 and 5*). But joinder is only an option, not an obligation, for the Tribunal. Since the complainant expresses opposition in her rejoinder to the proposal for joinder the Tribunal prefers to deal with the cases separately.

The impugned decision

9. What decision is being impugned? The parties differ. The complainant says in the complaint form that she is challenging a decision of "18.12.95" notified to her on "19.03.96", whereas the defendant says that the impugned decision is the one that was notified to her in its letter of 19 March 1996 and that, if her complaint were challenging the decision of 18 October or some other dated 18 December 1995, it would be irreceivable.

10. There being no text of any decision dated 18 December 1995 in the case records, there may be a mistake in the entry in the complaint form about the date of the impugned decision. But the complainant's claims are clear: she is objecting to the refusal of her claim to promotion to A3 as from 1994 and that decision is in the letter of 19 March 1996. The conclusion therefore is -- *jura novit curia* -- that that is the impugned decision.

The promotion of permanent employees

11. The procedure at the EPO for promoting permanent employees is in two stages.

12. At the first stage the Organisation lays down the conditions for promotion. It then has a full list drawn up of those who qualify. Any permanent employee who qualifies is entitled to be put on the list and the Organisation is bound to put him on the list. According to the rules that govern this stage of the procedure any staff member who believes that he qualifies may claim inclusion.

13. Here the complainant filed an internal appeal. In accordance with the Appeals Committee's recommendation the President sent her case back to the Promotion Board, and asked the Board to complete the list. Her name was then put on the list. That acknowledged by implication that "fair contribution" was not a further condition for promotion. As to the first stage the complainant therefore obtained full satisfaction.

14. At the second stage the Promotion Board puts the listed employees in order of merit and the President accordingly decides which of them are to be promoted. Promoting a staff member is at the President's discretion, and so his decision is subject only to limited judicial review. The Tribunal will set it aside only if it was taken without authority or in breach of a rule of form or of procedure, or if there was some mistake of fact or of law, or if some material fact was overlooked, or if there was abuse of authority, or if a plainly wrong conclusion was drawn from the facts. Meeting the minimum conditions for promotion does not confer on the employee any right to such promotion at the second stage.

15. That is not how the complainant sees her position. In her letter of 19 October 1994 to the President of the Office she says:

"The reason why I have not been promoted is not clear to me since I qualify for promotion from A2 to A3 ..."

And she presses the plea in her complaint:

"I filed a provisional internal appeal on 19 October 1994 ... seeking promotion from A2 to A3 because I meet the conditions for promotion set out in Gazette No. 14/94 ..."

16. The plea fails because no staff member may assert any individual right to promotion. The President applied the criterion of "fair contribution" in putting the candidates in order of merit. That criterion, which relates to output, is only one of several that the President may apply and it does not appear unreasonable or absurd in itself. Since applying the criterion of "fair contribution" to determine the order of merit of candidates for promotion is a matter within the President's discretion his decision is not subject to review by the Tribunal save where there is one of the flaws set out in 14 above. Here there is none.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Julio Barberis, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

**William Douglas
Michel Gentot
Julio Barberis
A.B. Gardner**