

THIRTY-FIFTH ORDINARY SESSION

In re LAMADIE

Judgment No. 262

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Patent Institute drawn up by Mr. Guy Yves Pierre Lamadie on 7 February 1975 and brought into conformity with the Rules of Court on 13 March 1975, the Institute's reply of 14 April 1975, the complainant's rejoinder of 22 May 1975 and the Institute's surrejoinder of 25 June 1975;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Articles 1, 22, 25, 30, 91 and 94 of the Institute Staff Regulations and the criteria for promotion on merit adopted by the Careers Committee of the Institute;

Having examined the documents in the dossier, oral proceedings having been neither requested by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant joined the service of the Institute as a probationer at grade A8 on 1 September 1971. On 31 August 1972 he had his appointment confirmed and was classified at grade A7, step 1, with effect from 1 January 1972. With effect from the same date he was granted an additional service benefit of twenty-four months which, because of the retroactive effect of his classification at grade A7, step 1, was tantamount to additional seniority of sixteen months at that grade and step. By decision of 11 November 1974 notified on 14 November he was promoted to grade A6, step 1, with effect from 1 September 1974 and with no seniority at that step. On 20 December 1974 he wrote to the Director-General asking him to review his decision and make that promotion take effect, not from 1 September 1974 in accordance with section 2.I.a of the criteria for promotion adopted by the Careers Committee, but from 1 January 1974 in accordance with section 2.I.b of those criteria. In his reply of 7 January 1975 the Director-General refused. By letter of 27 January the complainant sent the Director-General a second request to that effect and on 7 February 1975 filed his complaint with the Tribunal.

B. The complainant points out that the section of the criteria adopted by the Careers Committee which was applied in his case was section 2.I.a and that section 2.I.b would have been more favourable to him in that its application would have entailed taking fuller account of his performance reports and seniority. In his view the criteria drew no distinction between actual length of service and the notional seniority reflected in the grant of service benefit. He therefore considers it unjust that he should lose twelve months' seniority on promotion "when the application of a different section of the criteria would have obviated such injustice". He observes that whereas on having his appointment confirmed he had been granted, not twenty-four, but only twenty months' service benefit, he would have been promoted in accordance with section 2.I.b with effect from 1 January 1974; in other words, because he had received four months' additional service benefit he was promoted with effect from a date several months later. He believes that he met the minimum conditions laid down in section 2.I.b of the criteria on 1 January 1974, that the Director-General should therefore have Promoted him with effect from that date, and that the Director-General's decision not to do so was an abuse of authority.

C. In the claims set out in his complaint and supplemented in his rejoinder the complainant asks the Tribunal to declare that section 2.I.b is applicable to him, that that section should be applied to him as being the one more favourable and that the date on which his promotion to grade A6 takes effect should be 1 January 1974, and that the Institute should pay him 1,000 guilders towards the cost of drawing up his complaint, plus damages for belated payment of salary due to him.

3. In its observations the Institute contends that the impugned decision, which was taken on the Careers Committee's recommendation, falls within the discretionary authority conferred on the Director-General by Article 25 of the Institute Staff Regulations and that since the impugned decision is not tainted with any of the flaws which entitle the Tribunal to interfere the complainant may not ask the Tribunal to alter that decision by substituting its

own judgment for that of the Director-General. Nor can he properly maintain that he should be promoted with effect from the same date as the officials named in the Careers Committee's recommendation under section 2.I.b. That section applies only to officials who had twelve months' seniority at the second step of grade A7 in 1974, not to those who had such seniority earlier, such as the complainant, who had it in 1973. The purpose of the criteria for promotion is to maintain balance between the two principal factors warranting promotion, seniority and performance. For that purpose the Careers Committee adopted an inductive approach and in endorsing the Committee's conclusions so did the Director-General. To promote the complainant with effect from the same date as the officials covered by section 2.I.b of the criteria would not only be incompatible with that section but invalidate the results of the comparative appraisal of officials' performance carried out by the Careers Committee and the Director-General in accordance with the Staff Regulations.

E. The Institute observes that in 1973, when the complainant had the seniority stipulated in section 2.I.b, his merits were not thought to warrant promoting him with effect from 1 September 1973, the date on which he acquired such seniority - and a date only four months earlier than that from which the complainant claims that his Promotion should take effect. The Institute states that in considering seniority as a criterion for promotion it cannot refer simply to the grading on the salary scale of officials who qualify for promotion but, so as not to disrupt the progress of careers, must determine whether and to what extent such grading reflects any service benefits. In the present case, it maintains, all the officials listed by the Careers Committee under section 2.I.b were receiving service benefits lower than those granted to the complainant and their grading on the salary scale was therefore largely determined by their actual length of service. "Granting the complainant the benefit of section 2.I.b would therefore invalidate the appraisal underlying the wording of that section and, by extension and with due regard to cases similar to the complainant's, would upset the balance of the corpus of the Director-General's decisions on Promotions to grade A6 in 1974." The complainant cannot therefore properly maintain that the impugned decision causes him prejudice on the grounds that it reduces the amount of the service benefits which he was granted on having his appointment confirmed. Since section 2.I.b was not applicable to him it serves no purpose to make any comparison between his present grading on the salary scale and that which would have resulted from applying that section.

F. The Institute therefore asks the Tribunal to declare that the complaint is unfounded, that the decision to promote the complainant with effect from 1 September 1974 is upheld and that he is not entitled to damages.

CONSIDERATIONS:

As to the Tribunal's power of review:

1. Article 25(1) of the Staff Regulations provides (Registry translation): "Promotion is granted by decision of the Director-General. The official who is promoted is appointed to the next highest grade in the category to which he belongs. Promotion is made exclusively by selection from among officials who have a minimum seniority in their grade after comparative appraisal of the merits of those qualified for promotion and of their performance reports." It appears from this provision, and in particular from the word "selection", that as a rule the decision whether or not to Promote an official falls within the discretionary authority of the Director-General and is therefore subject to only limited review by the Tribunal. In general the Tribunal will not interfere with the decision unless it was taken without authority, or violates a rule of form or procedure, or is based on an error of fact or of law, or if essential facts have not been taken into consideration, or if it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts.

There does remain the possibility, however, that, instead of granting promotion on the merits of each case, the Director-General should before taking his decisions lay down rules or criteria for promotion which he notifies to the staff. In that case a distinction should be drawn. First, in formulating the rules themselves the Director-General exercises real discretionary authority. Accordingly, when the Tribunal has to determine the validity of such rules its power of review takes the limited form described above. But secondly, the Director-General is then bound to observe those rules, which have legal force. Accordingly the Tribunal will regard any infringement of those rules as a flaw which warrants quashing the impugned decision.

In the present case the Director-General informed the staff of the criteria for promotion applicable in 1974. Those criteria were not contested in themselves and the sole question which arises is whether or not the impugned decision observes those criteria.

As to the applicable criteria for promotion:

2. Section 2.I.a of the staff circular concerning the criteria for promotion states (Registry translation): "Officials who reached the third step in grade A7 not later than 1974 and who are deemed to have shown sufficient merit, i.e. provided they have obtained performance marks of at least 15 for each of the years 1971, 1972 and 1973 or a performance mark of at least 16 for 1973, as confirmed by their performance reports, are promoted to grade A6 from the date proposed by the competent committee."

That was the section on which the Director-General based his decision to promote the complainant with effect from 1 September 1974. The complainant implicitly admits that that section is applicable to him and that the date determined on the basis of that section is correct. He maintains, however, that he is also entitled to promotion in accordance with section 2.I.b and that by virtue of that section, which is more favourable to him than section 2.I.a, his promotion should take effect from 1 January 1974.

3. Section 2.I.b provides (Registry translation): "Officials who in 1974 had twelve months' seniority at the second step of grade A7 and who obtained a performance mark of at least 15.5 in 1972 and 16.5 in 1973, as confirmed by their performance reports, are promoted to grade A6 from the date proposed by the competent committee."

Thus the application of section 2.I.b is subject to two conditions, one relating to seniority and the other to performance. If officials who had twelve months' seniority in 1974 at the second step of grade A7 meet the condition relating to seniority, a fortiori so does the complainant, since, as both parties agree, by 1973 he had already been at that step for twelve months. Moreover, since the complainant obtained a performance mark of 16 in 1972 and one of 16.5 in 1973 and both marks are duly confirmed, he also meets the condition relating to performance. He is therefore entitled to claim the application of section 2.I.b.

It is true that whereas section 2.I.a refers to officials who reached a specific step "not later than" 1974, section 2.I.b refers merely to those who by 1974 had a certain seniority at another step. However, contrary to what the Institute contends, the absence of the words "not later than" in section 2.I.b does not mean that that provision applies only to officials who had the required seniority in 1974 to the exclusion of those who had it earlier. Whether intentional or not, the difference between the two texts does not necessarily mean that the solutions should be different. The solution should nevertheless be based on objective reasons. As the following considerations indicate, however, it was not so based in the present case.

The Institute contends that, since section 2.I.b takes account of performance as well as of seniority, to grant the complainant the benefit of that section would be to overlook the importance of performance. That argument is irrelevant. As was indicated above, in 1972 and 1973 the complainant met the conditions required under section 2.I.b for those two years. There is no need to consider whether, had that section been applicable in 1973, the complainant would have met the conditions relating to performance during the two previous years. The question is to determine his position in 1974, not the position he would have been in earlier.

The Institute also maintains that in adopting section 2.I.b the Director-General took account of the actual length of service of officials and that consequently that provision applies only to officials who had the required seniority in 1974. To that argument the complainant puts forward the objection, among others, that the criteria based on actual length of service declare it expressly, unlike section 2.I.b, which refers to "seniority" without further explanation. In the present case it is not necessary to consider this textual argument. It suffices to observe that the Institute's interpretation implies an unwarranted result, namely that the complainant ought to have been deprived of the benefit of section 2.I.b on the grounds that on having his appointment confirmed he had received several months' service benefit too many. Clearly the appraisal of his performance which secured the complainant such a benefit on the termination of his probation cannot stand in the way of his subsequent promotion.

As to the consequences of the applicability of two criteria:

4. It appears from the foregoing that the complainant is justified in contending that both section 2.I.b and section 2.I.a of the Director-General's circular to the staff are applicable. He is therefore as a matter of course entitled to rely on the provision which is more favourable to him.

In the present case, as the parties admit, promotion takes effect from 1 January 1974 under section 2.I.b, but only from 1 September 1974 under section 2.I.a. The former provision is therefore more favourable to the complainant

than the latter, which the director-General was wrong in taking as the basis for his decision. The impugned decision should therefore be reviewed.

Moreover, the complainant is entitled to claim compensation for the prejudice which he suffered by reason of the refusal to pay him from 1 January 1974 the salary increase entailed by promotion. Instead of paying him lump-sum compensation the amount of which could not be precisely determined in the circumstances, it seems appropriate to order the Institute to pay interest at the rate of 6 per cent a year on the overdue sums with effect from the dates on which they ought to have been paid.

As to the award of costs:

5. In principle a complainant whose complaint is allowed in whole or in part is entitled to costs, to be paid by the defendant organisation. There is no need for the complainant to have put in an express claim for such costs. Nor is it material whether he has been assisted or represented by counsel. However, costs are payable only to the extent warranted by the circumstances of the case, that is to say its nature, importance and complexity and the actual contribution made by the complainant or his counsel to the proceedings.

In the present case it is appropriate to award the complainant on the basis of these rules costs amounting to 200 guilders.

DECISION:

For the above reasons,

1. The complainant is promoted from grade A7 to grade A6 with effect from 1 January 1974.
2. The Institute is ordered to pay the complainant interest at the rate of 6 per cent a year on the overdue sums with effect from the dates on which they ought to have been paid.
3. The Institute is ordered to pay the complainant costs amounting to 200 guilders.
4. The remainder of the complainant's claim is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 27 October 1975.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet