

FORTY-SECOND ORDINARY SESSION

***In re* MERTENS**

Judgment No. 370

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the European Patent Organisation (EPO) by Mr. André Eugène Sydney Octave Joseph Mertens on 27 February 1978, the EPO's reply of 5 April, the complainant's rejoinder of 5 May and the EPO's statement of 3 August 1978 that it did not wish to file a surrejoinder;

Considering Article II, paragraph 5, of the Statute of the Tribunal, the Staff Regulations of the former International Patent Institute, particularly articles 10, 23, 25, 26, 27, 82 and 83, and the Staff Regulations of the European Patent Office, the secretariat of the EPO;

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

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

A. On 1 July 1973 the complainant joined the staff of the International Patent Institute as an administrative assistant. Under article 25 of the Staff Regulations which were then in force he was promoted to grade B3 with effect from 1 July 1974, when he had his appointment confirmed.

B. On 13 September 1977 the list of staff members eligible for promotion for 1977 was posted up on the Institute premises. The complainant was one of those eligible for promotion to B2 in accordance with the career pattern for an administrative assistant. Careers Committees were appointed on 11 October to draw up the promotion rosters. On 14 October the Director-General of the Institute sent the competent Careers Committee a minute in which he said, with regard to promotions to B2, that "the competent Careers Committee shall draw up a list in order of merit of all staff members eligible for promotion". The decision promoting officials in 1977 was posted up in the Institute on 9 December 1977.

C. The complainant was not on the list of promotions to B2. By a letter of 15 December he accordingly submitted an internal appeal to the Director-General. On 1 January 1978 the European Patent Organisation succeeded the International Patent Institute and on that date the complainant became an official of the European Patent Office in accordance with the integration agreement concluded between the two organisations. In a letter of 1 February 1978 in reply to his letter of 15 December 1977 the complainant was informed that in accordance with the Staff Regulations of the former Institute the decision of 9 December 1977 was, so far as the EPO was concerned, final. That is the decision now impugned.

D. The complainant believes that his merits are comparable with those of the first two candidates, who did get promotion. The Careers Committee "does not seem to have performed its task with the conscientiousness one might have expected of it" nor does the Director-General's decision seem to have been founded "on any more consistent grounds". The decision not to promote him constitutes wrongful and unfair treatment, especially in view of its effects on his subsequent career. He was appointed administrative assistant in 1973 and as such had access to the higher grade, B2, with a maximum yearly salary of 68,908 guilders. "The decision had the effect not only of postponing for some time the normal financial benefit of promotion but also of preventing him from reaching that maximum salary level. Moreover, as a result of the absorption of the Institute staff by the EPO on 1 January 1978 the complainant was automatically graded B5 in the grading system of the new organisation, whereas other staff members promoted to Institute grade B2 in 1977 were given grade B6 in the European Patent Office. Grades B5 and B6 in that Office are not combined, and the almost automatic career system which applied in the Institute does not exist in the Office. It is true that the complainant is guaranteed at least the remuneration which he would have received in Institute grade B3; but he has now no hope of obtaining the remuneration he would have got in Institute grade B2. If he happened to be promoted to Office grade B6 his remuneration would still be that of

Institute grade B3, which is higher than that of Office grade B6. On the other hand, officials who were promoted to Institute grade B2, and who now have Office grade B6, will get the remuneration which applied to Institute grade B2." The complainant therefore considers that he has suffered a covert penalty, although he has always been regarded as a good official.

E. In his claims for relief the complainant asks the Tribunal to decide:

"(a) that the decision of 9 December 1977 was wrongful;

(b) that he should have been promoted to Institute grade B2;

(c) should the Tribunal unaccountably refuse to order his promotion to Institute grade B2, that his remuneration from the EPO, although, since 1 January 1978, he has held only EPO grade B5, is that which he would have received had he been promoted to Institute grade B2;

(d) that he should be paid damages corresponding to 4 per cent interest on the difference between B3 and B2 remuneration from the date of his promotion, in the usual way (from the anniversary of the date of taking up appointment);

(e) that he should be paid 1,000 guilders to cover costs;

(f) that the Organisation should produce comparative data (on seniority, performance marks, and the like) for all B3 staff members whether or not they reached grades B2 and A7 in the Institute so that the complainant may, if need be, submit further pleas and the Tribunal may pass judgment in full knowledge of the facts."

F. The Organisation points out that in the Institute promotion is a matter of discretion for the Director-General to decide and one in which the Tribunal has only a limited power of review. The Careers Committee and the Director-General carried out a full comparative review of the files of the administrative assistants eligible for promotion to B2 in 1977 (merit, seniority, and performance reports). It did not draw any clearly mistaken conclusions from the facts, and the impugned decision was properly substantiated by the statement that it has made the comparison of merit stipulated in the Staff Regulations. "As for the complainant's arguments concerning the consequences of the fact that he was not promoted to B2 before his transfer to the EPO, he is mistaken in describing the promotion system in the former Institute as an 'almost automatic career system'. ... The first paragraph of article 25 of the Staff Regulations of the former Institute states that 'promotion is made exclusively by selection'⁽¹⁾ and is therefore not a right. Hence the only difference between the system of promotion in the former Institute and the system laid down in the EPO Staff Regulations is that in the Institute a post could be given any one of two or three grades within a single 'career pattern'. In the EPO, however, there is only one grade corresponding to any post. Hence an Institute official could be promoted within a career pattern without changing employment, whereas in the EPO an official who is promoted either changes his employment or else has his post regraded. Lastly, it is true that, if promoted to grade B6 after his transfer to the EPO, the complainant would not receive the remuneration he would have obtained had he been promoted to Institute grade B2 before transfer. But that is the result of the provisions governing the complainant's transfer from the Institute to the EPO and has no bearing on the circumstances in which the complainant could be promoted under the Institute Staff Regulations before transfer to the EPO."

G. The Organisation asks the Tribunal to dismiss the complaint outright.

CONSIDERATIONS:

As to the receivability of the complaint:

1. On 9 December 1977 the Chief of Personnel of the International Patent Institute published the list of the staff members whom the Director-General had promoted in 1977. The complainant was not on the list. On 15 December 1977 the complainant submitted to the Director-General an appeal for review which he wished to have treated as an internal appeal if the earlier decision was upheld. On 1 February 1978 the Director-General, who had in the meantime become Vice-Chairman of "General Directorate I", dismissed the appeal and said that since the decision notified on 9 December 1977 was not subject to internal appeal an appeal against it would lie only to the Tribunal. He added that he was passing on the appeal for review to the President of the EPO but did not recommend allowing

it. Having studied the dossier, the President of the EPO took no action. Hence the decision which may be challenged was indeed the one notified on 9 December 1977 and the complaint, having been filed within ninety days from that date, is receivable.

As to whether the internal means of redress were exhausted:

2. Article 82 of the Institute Staff Regulations states:*

"A staff member, former staff member or his successors may submit an internal appeal alleging non-observance of the present Staff Regulations and seeking the quashing or amendment of any individual decision to which they object.

The provisions of the previous paragraph shall not apply to any decisions taken after consulting one of the joint bodies mentioned in article 10. Furthermore, any staff member may file an internal appeal alleging unfair or wrongful treatment and seeking an end to such treatment."

According to the first paragraph of article 83 of the Staff Regulations an internal appeal is lodged by addressing an application to the Director-General or, where a decision of the Administrative Council is impugned, to the Council. According to the third paragraph of article 83, if the Director-General or the Council disallows the appeal, the case goes straight to the Appeals Committee.

3. On 15 December 1977 the complainant submitted to the Director-General an application for review of a decision, stating that that application might be treated as an internal appeal.

On 1 February 1978 the Director-General, by then Vice-Chairman of General Directorate I, rightly pointed out that an internal appeal was barred by the second paragraph of article 82 of the Institute Staff Regulations since the decision had been taken after consultation of the Careers Committee, one of the joint bodies mentioned in article 10. It is immaterial that according to the last sentence of that article an internal appeal may be filed alleging unfair or wrongful treatment. It is clear from the context that no such appeal may be filed once a decision has been taken.

4. The complainant contends, however, that the question of the receivability of the internal appeal ought to have been decided by the Appeals Committee itself, not by an intermediary such as the Director-General, who was also Vice-Chairman of General Directorate I. It is true that as a rule a decision not to hear a case should be taken by the appeals body and not by the body which communicates the appeal to it. In the present instance, however, it was so obvious that no internal appeal would lie that the intermediary can hardly be blamed for not letting the appeals body itself declare the appeal irreceivable. In any case it would be unduly formalistic to quash the impugned decision because of a flaw which had no effect whatever on the proceedings or on the outcome of the case.

As to the communication of information:

5. On 15 December 1977 the complainant asked the Director-General to let him have the report of the Careers Committee and the "comparative data" on the officials promoted to grade B2 in 1977 and on the officials not so promoted. He received, appended to a letter dated 1 February 1978, a copy of the report of the Careers Committee, which was sent to him in confidence and without other information. In his claims for relief he asks the Tribunal to decide "that the Organisation should produce comparative data (on seniority, performance marks, and the like) for all B3 staff members whether or not they reached grades B2 and A7 in the Institute so that the complainant may, if need be, submit further pleas and the Tribunal may pass judgment in full knowledge of the facts".

The Organisation's reply includes a comparative table which gives the following information on the two officials promoted to B2 for 1977 and on the complainant himself: the date when they joined the Institute staff; the date of their appointment to grade B3; the step they had reached in that grade by 1977; their age; and their performance marks for 1974, 1975 and 1976. The complainant did not question the accuracy of that information in his rejoinder, and the Tribunal finds the information adequate. All that the Tribunal has to determine is why the two staff members promoted to B2 for 1977 were thought to be more deserving than the complainant. The reasons why other staff members were kept at B3 or promoted to A7 - a grade which the complainant was not interested in - are immaterial and need not therefore be considered here.

As to the decision not to promote the complainant:

6. The decision not to promote the complainant from B3 to B2 in 1977 is a discretionary decision. Hence the Tribunal may quash it only if it was taken without authority, or is tainted by a formal or procedural flaw, or is based on a mistake of fact or of law, or if essential facts were left out of account, or if the decision is tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts. The complainant has failed to establish any of the flaws which entitle the Tribunal to interfere.

7. In particular, there is nothing to suggest that in taking the impugned decision essential facts were left out of account. As the Careers Committee states in its report, it compared the merits of the officials concerned, with due regard to their seniority and age. The impugned decision is no doubt based on the same criteria, which as a rule are the ones applied. The reason why the Careers Committee and the Director-General took no account of the performance marks for 1977 is simply that the marks had not yet been determined; and the reason why they did not consider the case of the officials promoted to A7 is that those officials were candidates in a competition in which the complainant had not taken part and were therefore not in the same position as he.

8. Lastly, it does not appear from the dossier that clearly mistaken conclusions were drawn from the facts. One of the two officials promoted to B2 in 1977 joined the Institute staff 20 years earlier than the complainant, had reached B3 a year earlier, was at a much higher step and had been given the same performance marks as he from 1974 to 1976. He therefore had qualifications which the complainant did not. The other staff member promoted to B2 in 1977 had joined the Institute staff and reached B3 earlier than the complainant, was at a higher step and had been given a higher mark in 1976. Hence, although that official was three years younger than the complainant, the Director-General was entitled to give him preference and did not abuse his discretionary authority.

Moreover, the effects of the decision not to promote the complainant derive from the relevant rules. However detrimental the complainant may find them, they afford no reason for promoting him.

DECISION:

For the above reasons,

The complaint and the applications to intervene are 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, Bernard Spy, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 18 June 1979.

(Signed)

M. Letourneur
André Grisel
Devlin

Bernard Spy

1. Registry translation.