

SIXTY-THIRD SESSION

In re WEST (No. 5)

Judgment 845

THE ADMINISTRATIVE TRIBUNAL,

Considering the fifth complaint filed by Mr. Julian Michael West against the European Patent Organisation (EPO) on 22 December 1986 and corrected on 11 January 1987, the EPO's reply of 1 April, the complainant's rejoinder of 24 April and the EPO's surrejoinder of 8 July 1987;

Considering the application to intervene filed by Miss Eileen Hunter on 21 May 1987 and the EPO's observations thereon of 10 June 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 116 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. The complainant joined General Directorate 2 of the EPO in Munich as a substantive examiner of patents at grade A3 in January 1982.

New general rules on promotion were introduced as from 1981 and are embodied in document CA/20/80, which the Administrative Council of the EPO approved in 1980. The rules require at least 19 years' reckonable experience, where the examiner's work is rated "good", for promotion to A4. Though the complainant's performance was rated "good", his experience by 1 January 1985 came to only 13 years and 6 months. He was not on the list of promotions to A4 in 1985, and on 15 October 1985 he lodged an internal appeal against the decision not to promote him. He claimed promotion under the so-called "rapid promotion rule", a transitional arrangement the Council approved in December 1980 and which appears in paragraph 64 of CA/PV 10. The rule is an exception to CA/20/80 and says that for non-German substantive examiners recruited to General Directorate 2 at A3 before 1 January 1981 13 years' experience will, as before, suffice for promotion. On 12 December 1985 the President of the Office referred the complainant's appeal to the Appeals Committee. In its report of 14 October 1986 the Committee recommended rejecting it, and the Principal Director of Personnel informed the complainant by a letter of 17 November 1986, the impugned decision, that the President did so.

B. The complainant submits that CA/PV 10 precludes rapid promotion for examiners promoted to A3 before 1 January 1981 and examiners recruited or transferred to General Directorate 2 on or after that date. Yet the list of promotions to A4 in 1985 included four who had been promoted to A3 before the date and at least one who was transferred to General Directorate 2 after it. The complainant believes that as many as 25 examiners who did not qualify have been promoted. If the President may thus extend the application of the rule the principle of equality requires him to extend it also to examiners, like the complainant, who have been recruited since 1 January 1981. He claims (1) promotion as from 1 January 1985 on the grounds that by then his experience came to over 13 years. If the President may not extend the system, he claims (2) damages for the impairment of hopes of further promotion to A5 because of the unlawful promotion of others, and he sets the amount at 1,000 Deutschmarks for everyone unlawfully promoted, or 25,000 DM.

C. The EPO submits that the claim to promotion is devoid of merit. The principle of equality does not require that a staff member enjoy a benefit unlawfully conferred on others and the complainant may therefore not rely on the breach he alleges of the principle. Besides, he was not in the same position in fact and in law as the others whose cases he cites. Whatever other differences of fact there may be, everyone who got A4 under the rule for rapid promotion joined the EPO and reached grade A3 before 1 January 1981, whereas the complainant did not join until 1982. The Tribunal has upheld the increase - in CA/20/80 - in the experience required for promotion to A4 on the grounds that the EPO's needs demanded it, and has found no breach of equality in continuing to apply the old rules on promotion - which provided for the more rapid promotion - to anyone recruited while they were still in force.

The complaint would succeed only if the EPO had applied the old rules to those who joined later.

The claim to damages for impairment of promotion prospects is irreceivable because it did not form part of the internal appeal and has a different foundation in law. Besides, it is devoid of merit. The President has discretion to apply the rule on rapid promotion to staff who are not strictly covered by it. The rule does not amount to compulsory Council guidelines under Article 116 of the Service Regulations, which does not provide for the adoption of guidelines on the minimum number of years of experience required for promotion. Nor does the Council's approval of the rule prevent the President's applying it to staff it does not expressly cover. He has exercised his discretion correctly, and there is nothing unlawful about any consequent impairment of the complainant's hopes of promotion to A5.

D. The complainant presses his claims in his rejoinder. He enlarges on his main arguments. In his submission the President of the Office infringed the principle of equality in granting rapid promotion to examiners who had been promoted to A3 before 1 January 1981 and to examiners who were transferred to General Directorate 2 at A3 after that date, yet not to examiners like himself recruited to General Directorate 2 after the date. In any event he has an acquired right to limitation of the rule to those who come within it. On the EPO's own admission his complaint should succeed because at least three examiners recruited after 1 January 1981, whom he names, have had rapid promotion: they were recruited at A4 when their starting grade should have been A3. He adds that he would not press his claim to damages for loss of promotion prospects if the examiners unlawfully promoted to A4 were relegated to A3. He explains how the unlawful promotion of others hampers his own later promotion to A5. He alleges that the EPO intends to give rapid promotion to one official who does not fall into any of the categories that have benefited so far, and to backdate it to 1985.

E. In its surrejoinder the EPO develops its case and seeks to refute the arguments in the rejoinder. It maintains that, like any other examiner recruited after 1 January 1981, the complainant is not in the same legal position as examiners who already held permanent appointments at that date: there is therefore no breach of the principle of equality. Nor is there any breach of an acquired right: the complainant has no acquired right to faster promotion since it had ceased to apply to recruits over a year before he joined the staff. In the EPO's submission his other arguments are unsound in fact, the cases he cites of other examiners being distinguishable. He has no sound reason to challenge the treatment of other examiners who were correctly offered recruitment at A4 as far back as 1980. Besides, the issue in this case is promotion, not the starting grade.

CONSIDERATIONS:

1. Two issues are raised in this case: (1) whether the complainant may benefit under the rule allowing of "rapid promotion", which is set forth in paragraph 17 of the EPO guidelines in document CA/20/80, and should therefore, as he claims, be promoted to grade A4 as from 1 January 1985 on the grounds that by then his experience came to over 13 years; and (2) whether he should be awarded damages for the impairment of his hopes of further promotion to grade A5 on account of the unlawful promotion of others.

The claim to promotion to A4

2. As to the first issue, the general rule on promotion from A3, the complainant's grade, to A4, is set out in CA/20/80 and it requires at least 19 years' reckonable experience. At the material time, 1 January 1985, his experience came to only 13 years and 6 months.

3. There is, however, an exception to the general rule which is provided for in paragraph 64 of document CA/PV 10. The paragraph says that for non-German substantive examiners who were recruited at A3 before 1 January 1981, 13 years shall, as before, suffice for promotion. The complainant claims promotion by virtue of the exception.

4. The complainant cannot benefit from the exception because he was recruited after 1 January 1981.

His argument is that there are three categories of examiners who have had the benefit of the exception even though they do not come within its scope, and that not to promote him was a breach of the principle of equal treatment.

But the cases the complainant cites were quite different from his. The other examiners were all appointed or promoted to A3 before 1 January 1981, whereas the complainant was neither. Appointed as he was in January 1982, he falls into another category, and there has been no breach of equal treatment.

Besides, even if an examiner appointed after 1 January 1981 had been promoted contrary to the rapid promotion rule in CA/20/80, that is no reason for unlawfully promoting the complainant. As the Tribunal stated in Judgment 614 (in re Ali Khan No. 3), a complainant may not rely on unlawful treatment which conferred benefit on other staff members: equality in law does not mean equality in the breach of it.

The claims to damages and costs

5. There being nothing unlawful about refusing the complainant promotion to A4, there is no question of awarding him damages or costs.

The application to intervene

6. Since the complaint fails, so too does the application to intervene.

DECISION:

For the above reasons,

The complaint and the application to intervene are dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and the Right Honourable Sir William Douglas, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 10 December 1987.

(Signed)

Jacques Ducoux
Mohamed Suffian
William Douglas
A.B. Gardner