

EIGHTY-SIXTH SESSION

***In re* Raths (No. 5), Schorsack (No. 2) and Stiegler**

Judgment 1804

The Administrative Tribunal,

Considering the fifth complaint filed by Mr. Gaston Rath against the European Patent Organisation (EPO) on 24 October 1997 and corrected on 25 November, the second complaint filed by Mrs. Barbara Schorsack against the EPO on 29 October and corrected on 25 November, the second complaint filed by Mrs. Elisabeth Stiegler against the same Organisation on 24 October and corrected also on 25 November 1997, the EPO's replies of 13 February 1998, the complainants' rejoinders of 20 March and the Organisation's surrejoinders of 28 April 1998;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. On 16 December 1988 the European Patent Office, the secretariat of the EPO, published a notice of vacancy, No. EXT/250, for a principal administrator at grade A4. The successful candidate was to serve as portfolio manager for the Organisation's Pension Reserve Fund. The notice required, among other things, at least nine years' professional experience of finance. The Selection Board recommended an outside candidate, Mr. Stuart Courteney, although he did not have the required experience, "because of previous difficulty in filling the post ... and because he fully matches the job profile". By a letter of 14 April 1989 the Principal Director of Personnel offered Mr. Courteney an appointment at grade A3, step 1, explaining that he might expect promotion to A4 at the beginning of 1994 if he did well in his new job. Mr. Courteney accepted the offer and took up duty on 1 June 1989. At the time he had five years and four months' recognised professional experience.

In 1994 the EPO put the case of Mr. Courteney to its Promotion Board. In a report to the President of the Office the Board said that he had the ten years' experience required for a grade A4 post but did not meet the criteria set out by the President in the EPO's *Gazette* of 18 July 1994, namely an "outstanding" level of performance and twelve to fifteen years' experience, or "very good" performance and fifteen to eighteen years' experience, or else "good" performance and nineteen to twenty-three years' experience. The Board did not put Mr. Courteney on the list of promotable staff but took the view that since for four years he had had assessments which rated his performance near the top of "good" he "should" qualify for the promotion in 1994 that he had been promised in 1989.

On 3 August 1994 the President wrote by hand in the margin of the Board's report "Promotion granted because of the commitment entered into on recruitment and because the conditions are met". The *Gazette* of 12 September 1994 announced that Mr. Courteney was to be promoted and on 7 December the President promoted him to grade A4 as from 1 January 1994.

The complainants are patent examiners at Directorate-General 2 (DG2) of the EPO. At the material time they held grade A3. On 8 December 1994 Mrs. Schorsack and Mrs. Stiegler and on the 9th Mr. Rath submitted letters of appeal to the President pointing out that at the date of promotion Mr. Courteney had had only ten years and two months' reckonable experience and that, even if his performance had been found "outstanding", he had therefore been promoted one year and ten months prematurely. Pleading breach of equal treatment, they asked the EPO to issue new criteria for promotion to be applied to them and to everyone else. They also asked the President to treat their letters as internal appeals if he rejected their claims. By letters of 27 January 1995 the Vice-President in charge of Directorate-General 4 told them that their claims were rejected. In letters of 10, 16 and 22 February they

told the President that they were pressing their appeals. On 2 March 1995 the Director of Staff Policy told them that the President had referred the case to the Appeals Committee.

At the hearings before the Committee on 23 April 1997 the complainants altered their claims to seek the quashing of Mr. Courteney's promotion and awards of moral damages. The Committee took up their appeals together. In its report of 9 June it declared them receivable on the grounds that Mr. Courteney's swifter promotion to A4 caused them injury. By a majority it nevertheless recommended rejecting their appeals as devoid of merit on the grounds that his promotion had been in fulfilment of a promise made to him on recruitment and so was not promotion by selection under Article 49 of the Service Regulations.

By letters of 5 August 1997, which are the impugned decisions, the Director of Personnel Development told the complainants that the President had endorsed the Committee's recommendation.

B. The complainants now hold grade A4. They are relying on Article 49(7) of the Service Regulations, which reads:

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and have at least two years service in their grade in the Office."

The complainants contend that Mr. Courteney was promoted to A4 though his performance was only "good" and he had only ten years and two months' experience. According to the criteria for promotion issued by the President in the EPO's *Gazette* of 18 July 1994, even someone whose performance is "outstanding" must have at least twelve years' experience to qualify for promotion to A4.

The complainants further contend that Mr. Courteney's promotion was in breach of equal treatment since he reached A4 faster than they did.

They ask the Tribunal to order the quashing of the decision of 5 August 1997 and grant full consequent relief, including - say Mrs. Schorsack and Mrs. Stiegler - the quashing of Mr. Courteney's promotion. Each of them claims 10,000 German marks in moral damages. Mrs. Schorsack and Mrs. Stiegler each claim 3,000 marks and Mr. Rath 1,000 in costs.

C. In its replies the EPO submits that the claim to the quashing of Mr. Courteney's promotion - which in Mr. Rath's case it takes to be implied - came too late in the internal appeal proceedings. It is therefore irreceivable under Article VII(1) of the Tribunal's Statute because the internal means of redress were not exhausted.

The EPO doubts whether the complainants have any cause of action in seeking the quashing of Mr. Courteney's promotion, which would cause him serious material and moral injury although he accepted the Organisation's offer in good faith. They were not candidates for his post.

On the merits the Organisation contends that the recruitment of Mr. Courteney was out of the ordinary since the post to be filled was a senior one requiring special knowledge. Article 7(1) of the Service Regulations bestows on the appointing authority some discretion in recruiting staff to "posts which require special qualifications".

Letting Mr. Courteney have grade A4 was not really promotion but the fulfilment of a promise made to him on recruitment. It was warranted by the quality of his performance and the experience he had gained.

The principle of equal treatment is irrelevant because the complainants are not qualified for the post of portfolio manager and so are not in the same position as Mr. Courteney.

In comments appended to the Organisation's replies Mr. Courteney points out that he accepted the Organisation's offer of 14 April 1989 in good faith. He seeks relief for any injury that the quashing of his promotion might cause him. He says that he met all the requirements for A4 and that he would regard the quashing of his promotion as breach of contract.

D. In their rejoinder the complainants submit that they exhausted the internal means of redress and that their complaints are fully receivable.

On the merits they contend that the only rules on promotion are in Article 49 of the Service Regulations; that there was no legal basis for the promise to Mr. Courteney and that it was discriminatory.

E. In its surrejoinders the defendant maintains that the complaints are partly irreceivable and presses its pleas.

CONSIDERATIONS

1. The complainants are all permanent employees of the European Patent Office and at the material time held grade A3. Mr. Stuart Courteney was recruited on 14 April 1989 at grade A3, step 1. The complainants learnt from the EPO's internal bulletin, the *Gazette*, of 12 September 1994, that the EPO was to promote Mr. Courteney to A4. By a decision of 7 December 1994 the President of the Office so promoted him as at 1 January 1994.

2. The complainants took the view that the promotion caused them injury. They believed that the EPO had not applied the same criteria to Mr. Courteney as to themselves, particularly in that he had not had the right number of years' experience. By letters of 8 and 9 December 1994 they asked the President of the Office to "remove the breach of equal treatment" by applying to them "the amended criteria for promotion that allowed a lower number of years of professional experience" and by promoting them from A3 to A4 "in accordance with those criteria". Mr. Raths further asked the President to publish the amended criteria, apply them to "everyone who qualifies thereby" and promote retroactively from A3 to A4 "everyone who so qualified". The complainants said that if the President rejected their claim their letters were to be treated as internal appeals under Articles 106 to 113 of the Service Regulations.

3. By identically worded letters of 2 March 1995 the defendant informed them that their appeals, though provisionally rejected, were referred to the Appeals Committee. In the proceedings before the Committee the complainants amended their claims so as to ask for the quashing of Mr. Courteney's promotion as unlawful and an award of 10,000 German marks "to each of them" in moral damages.

In a report of 9 June 1997 to the President of the Office the Committee recommended by a majority rejecting their appeals as devoid of merit. The opinion and recommendation of the two members in the minority were appended. By letters of 5 August 1997, again identical, the EPO told the complainants that their appeals were rejected, and those are the decisions they are impugning.

4. The defendant applies for joinder, and the complainants concur. Since the three complaints raise the same issues of law they are joined.

5. The complainants are asking the Tribunal -

to declare that the promotion of Mr. Courteney was in breach of the Service Regulations and therefore unlawful;

to order the quashing of the President's decision of 5 August 1997 and grant them full consequent relief;

to award each of them 10,000 German marks in moral damages; and

to award 1,000 German marks to Mr. Raths and 3,000 to each of the other two complainants in costs.

Mrs. Schorsack and Mrs. Stiegler further claim the quashing of Mr. Courteney's promotion.

Receivability

6. The defendant pleads that the complaints are partly irreceivable in that the claim to the quashing of Mr. Courteney's promotion was an improper enlargement of the original appeal and was put forward neither in proper form nor in time.

7. Only at the Appeals Committee's meeting of 23 April 1997 did the complainants alter their claims to seek the quashing of Mr. Courteney's promotion and the award of 10,000 German marks to each of them in damages. According to Article 108(2) of the Service Regulations the time limit for internal appeal was three months. The promotion of Mr. Courteney, though announced in the *Gazette* of 12 September 1994, was not decided until 7 December 1994. So any challenge had to be made no later than three months from 7 December 1994. The complainants' new claim to the quashing of the promotion, not formally put to the Appeals Committee until 23

April 1997, was out of time and is irreceivable because they failed to exhaust their internal remedies.

8. As for their other new claim, to moral damages, the defendant accepts it as receivable as a "legitimate corollary" of the complainants' original claim to retroactive promotion. Since it is receivable, the Tribunal will determine whether the promotion of Mr. Courteney caused them any actionable moral injury.

The merits

9. The complainants' first plea is that the defendant acted in breach of Article 49(7) of the Service Regulations in granting promotion from A3 to A4 to someone who did not fully qualify for it. Their second plea is breach of equal treatment.

10. At the material time promotion from A3 to A4 was governed by the following provisions:

Article 49 of the Service Regulations

"(1) A permanent employee may obtain a higher grade by a decision of the appointing authority:

...

d) by promotion to a post in the next higher grade in the same category;

...

(4) Where the appointing authority is the President of the Office he shall take his decision after consulting a Promotion Board.

...

(7) Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and have at least two years service in their grade in the Office.

...

(10) The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraphs 7 [and 9] above.

The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration.

The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

Note by the President to the chairman of the

Promotion Board, published on 18 July 1994

"III. Promotion from A3 to A4

The eligibility for promotion to A4 follows the criteria:

Individuals with a record of 'outstanding' merit between 12 and 15 years', those who are 'very good' normally between 15 and 18 years' and those who are 'good' in the range of 19-23 years' reckonable experience. Accession to each of these ranges of experience will also normally depend on the attainment of certain minimum ages, which lie within the range of 37-40 for those considered 'excellent', 40-44 for the 'very goods' and 44-48 for the 'goods'."

11. The EPO contends:

"The advancement of [Mr. Courteney] from A3 to A4, though it complied with some features of the promotion procedure (referral to the Promotion Board to ensure impartial assessment of performance in two reporting periods) was therefore not promotion *stricto sensu* but tantamount to putting him where he would have been had he on recruitment had the nine years' experience required in the post description."

According to the EPO the advancement was lawful because Mr. Courteney got it in fulfilment of a promise made to him on recruitment, and it is fully warranted by his performance and experience. The Organisation further argues that the complainants are mistaken in pleading breach of equal treatment because they are not at all in like case. Mr. Courteney was recruited to serve an important and urgent purpose, namely to fill the post of portfolio manager. The complainants, who are patent examiners, were not qualified for that post, which requires special knowledge.

12. To the Board the EPO represented the promotion of Mr. Courteney as the fulfilment of a promise made to him on recruitment, and the Board took it as such. Yet the decision of 7 December 1994 purported to be taken under Article 49(1)(d) of the Service Regulations.

Only that decision was notified to the staff. So the complainants, who were unaware of the promise, were in good faith in challenging the promotion on the grounds that it was in breach of the Rule it actually cited. So they were right in saying that Mr. Courteney had been promoted to A4 even though he did not fully qualify under the rules set out in 10 above in that his record of performance was not "outstanding" and he did not have twelve to fifteen years' professional experience.

13. Because of the unusual circumstances in which Mr. Courteney was promoted the complainants were also right to challenge the decision: the EPO had on the face of it failed to observe the general principle of equal treatment because in promoting Mr. Courteney it did not abide by the requirements of the Service Regulations or by the criteria for promotion to which the complainants were themselves subject.

14. The conclusion is that the complainants did suffer moral injury and each of them is entitled under that head to an award of 3,500 German marks. Each of them is also awarded 1,000 marks in costs.

DECISION

For the above reasons,

1. The EPO shall pay each of the complainants 3,500 German marks in moral damages.
2. It shall pay each of them 1,000 marks in costs.
3. Their other claims are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner