

NINETY-SIXTH SESSION

(Application for execution)

Judgment No. 2277

The Administrative Tribunal,

Considering the application for execution of Judgments 1667, 1910, 2064 and 2128 filed by Mr P. G. M. C. on 28 November 2002 (his third such application as regards Judgment 1910), the reply of 3 March 2003 submitted by the European Patent Organisation (EPO), the complainant's rejoinder of 25 June and the Organisation's surrejoinder of 23 July 2003;

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

Having examined the written submissions;

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

A. The complainant's career at the European Patent Office, the EPO's secretariat, is set out in Judgments 890, 1667, 1910, 2064, 2065 and 2128, to which reference should be made.

The complainant, who was an examiner at grade A3 in Directorate-General 1 (DG1) of the Office in The Hague, was seconded as a liaison officer to the Portuguese National Industrial Property Institute in Lisbon from 1 May 1992 to 31 December 1995. As from 1 January 1996, he resumed his duties as examiner in DG1 at the same grade, namely A3. In its Judgment 1667, delivered on 10 July 1997, the Tribunal gave a ruling concerning a promotion which the complainant had sought without success on the basis of promises he had allegedly received. The Tribunal concluded that the Organisation had given only a limited assurance that a successful secondment as liaison officer would be taken into account as a point in his favour whenever a decision was to be taken on promotion or on appointment.

At the time this application for execution was filed, the complainant had still not been promoted to grade A4.

B. The complainant deplores the fact that his current grade and duties are the same as they were prior to his departure for Portugal in 1992. In his view, the Organisation has failed to comply with rulings in Judgments 1667 and 2128, under 6, Judgment 1910, under 3, and Judgment 2064, under 12. He reiterates that his performance was rated "very good" in the overall assessment for 1990-91 and that the success of his mission should have been taken into account as an additional point in favour of a promotion; yet the EPO has refused to take account of three staff reports covering the period 1990-95.

Moreover, the complainant contends that he meets the requirements for promotion set out in the note from the President of the Office to the Chairmen of the Promotion Boards on 12 August 1996. The fact that he was not promoted shows, in his opinion, that the Organisation "has neither exercised nor intended to exercise" its discretion in relation to the assurances given. He points out that two officials who had likewise acted as liaison officers had made rapid progress in their careers.

He seeks the execution of the four above-mentioned rulings and the payment of 1,000 euros in costs.

C. In its reply the EPO maintains that no promise or assurance was breached by the conditions of the complainant's reassignment on his return from Portugal. There is nothing in Judgment 1910 to imply that a reconsideration of the complainant's case would necessarily lead to a promotion or that the fact that he was not promoted shows that his performance was wrongly assessed. The EPO denies that it does not intend to take account of the complainant's

staff reports for the period 1990-95.

It recognises that the complainant is currently "on the threshold of a promotion window". The fact that he has not yet been promoted to grade A4 is therefore in line with the content of the President's note and cannot be attributed to any ill will on the part of the President. The Organisation explains lastly that the two staff members who were promoted were not in the same situation in fact or in law as the complainant.

D. In his rejoinder the complainant alleges that he was treated unequally in comparison with one of the two above-mentioned staff members. He considers that in his case the EPO has no intention of taking account of any point whatever in his favour; despite the Tribunal's earlier rulings, it persists in considering his staff reports as the sole criteria for promotion.

E. In its surrejoinder the defendant Organisation rebuts the allegation of unequal treatment. It deduces from Judgment 2128 that the decision not to promote the complainant as from 1997 is lawful. Since the staff reports for 1998-99 and 2000-01 have not yet been completed, the Promotion Boards are not in a position to give an opinion on the possibility of a promotion for 1998. The Organisation contends that the complainant's activities as liaison officer were and are duly taken into account by the Boards. It asserts that the limited assurance he was given will be taken into account at the Boards' forthcoming meetings.

CONSIDERATIONS

1. The complainant requests the Tribunal to order execution of rulings in Judgments 1667 and 2128, under 6, 1910, under 3, and 2064, under 12.

He points out that his grade and duties at the time of filing his application are the same as they were prior to his departure for Portugal and contends that the President of the Office has failed to exercise his discretion in accordance with the Tribunal's rulings and has no intention of doing so. Referring to documents produced in earlier proceedings, he argues again that the Organisation was wrong in denying him a "very good" rating for the period 1 January to 8 March 1992, as it had done for 1990-91. He reiterates that he was discriminated against compared with two other colleagues, who received the same assurances as he did but who, since working as liaison officers, have made rapid progress in their careers.

2. The complainant's request for a hearing in his rejoinder must be denied, since the parties have had ample opportunity to express themselves in the course of two exchanges of briefs.

3. The application cannot succeed.

(a) An application for execution presupposes that the complainant is able to challenge an act or an omission by the organisation that employs him which is subsequent to the judgment concerned and contrary to the terms of the ruling.

In this case, the complainant does not challenge any specific act by the Organisation subsequent to the judgments of which he seeks execution; nor does he make clear in what respect it failed to execute them once they had been delivered. He merely reiterates pleas and facts which preceded the judgments, which are now *res judicata* and cannot be challenged.

(b) In order to avoid any misunderstandings and unnecessary proceedings, it is worth reminding the complainant that the mere fact that his assessment does not take account of the success of his mission in Portugal cannot be considered as a breach of the limited assurance he was given, provided that this assurance is duly taken into consideration in the overall assessment of his performance made for the purpose of deciding the promotion. This limited assurance had to be taken into account to the extent indicated by the Tribunal in the above-mentioned judgments and there is no reason to believe that this has not been the case.

4. The application must therefore be dismissed.

DECISION

For the above reasons,

The application is dismissed.

In witness of this judgment, adopted on 19 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet