

**In re SCHMITTER**

**Judgment No. 301**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Patent Institute drawn up by Mr. Jean-Marie Schmitter on 29 April 1976, the Institute's reply of 24 June and the complainant's rejoinder of 15 September 1976;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Institute Staff Regulations 5 and 25 to 30 and the general principles governing promotion adopted by the Administrative

Council of the Institute in October 1975;

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. On 1 September 1969 the complainant joined the staff of the Institute as an "examiner" on an appointment governed by the staff rules then in force. When new Staff Regulations came into force in 1972 he was graded, with effect from 1 January 1971, at grade A6, step 1, and given four months' seniority at that step in accordance with a table of equivalents approved by the Administrative Council and account being taken of the three years' seniority benefit he had obtained on confirmation of his appointment.

B. On 5 February 1976 a list of staff promotions for 1975 was posted on the Institute premises. As regards promotions to grade A5 it referred to the "general principles governing promotion" adopted by the Administrative Council in October 1975. The complainant's name did not appear in the list of promotions from A6 to A5 and on 11 March 1976 he appealed to the Director-General and on 29 April to the Tribunal. On 26 May, that is, after he had lodged his complaint, the staff was sent a circular, of which he himself received a copy on 28 May, notifying the promotions recommended by the Careers Committee. On 28 May he also received confirmation of refusal of his claim to promotion.

C. In his complaint, which is dated 29 April 1976, the complainant alleges infringement of a procedural rule and asks to be informed of the Careers Committee's recommendations, which at the time were not known and, as is stated in paragraph B above, were not published until 26 May. On the merits the complainant argues that the general principles governing promotion lay down two general criteria - length of service and performance - which a grade A6 official must fulfil to qualify for promotion to A5. He takes one of those general principles to require at least six years' actual service and a performance mark of 18. He believes that he fulfils both criteria, that the Director-General disregarded the general principles adopted by the Administrative Council and that the implied decision not to promote him overlooks essential facts in his dossier.

D. The complainant accordingly asks the Tribunal to quash the implied decision of 5 February 1976 not to promote him from A6 to A5 and, subsidiarily, to order the Institute to review the matter of his promotion.

E. In its reply of 24 June 1976 the Institute states that, as to the promotions from A6 to A5 for 1975, the Careers Committee, which advises, and the Director-General, who takes the decision, were guided by the general principles approved by the Administrative Council. According to those principles<sup>(1)</sup> "staff members shall normally be chosen for promotion to grade A5 only after nine to ten years' actual service, including five at grade A6". By 1975 the complainant had completed only six years' actual service and only four at grade A6, and so did not nearly have the seniority which would\* "normally entitle an examiner at the Institute to expect to be considered for promotion to grade A5 ... which is normally the grade reached at the end of a career and bears the title of principal examiner". Contrary to what the complainant contends, there is no general principle which sets criteria relating to length of service and performance which a grade A6 official must fulfil to qualify for promotion to A5 - such as the six years' actual service and the mark of 18 mentioned by the complainant. It is for the Careers Committee and the

Director-General to determine in each case whether and how far performance warrants promotion. In other words, no one may lay claim to promotion because of his performance and length of service since promotion comes only with a decision taken by the Director-General exercising his discretionary authority in keeping with the Staff Regulations.

F. The Institute admits that before taking his decision the Director-General did formerly set criteria for promotion which he notified to the staff. But that procedure neither was nor is compulsory. For the promotions for 1975 the Director-General preferred a system of grading by merit to the system based on criteria. It appears from the promotion roster drawn up by the Careers Committee in 1975 that the Committee studied the files of all the candidates for promotion and decided not to recommend promoting the complainant and that the Director-General himself studied the files before reaching the same conclusion. The Director-General did not base the promotions for 1975 on the criteria for promotion set by the Careers Committee, and a staff member may qualify by one of those criteria without gaining any entitlement to promotion. Although the complainant fulfilled the conditions set under criterion No. 1 the Committee did not on that account recommend promoting him. Contrary to what the complainant suggests, the Director-General cannot be bound by the criteria applied in earlier years and in deciding not to promote him properly exercised his discretionary authority under the Staff Regulations.

G. The Institute points out that it did notify to the complainant the competent Careers Committee's recommendations for promotions to grade A5 for 1975. It asks the Tribunal to dismiss the complainant's claims in their entirety as utterly unfounded.

H. In his rejoinder of 15 September 1976 the complainant acknowledges that it is for the Director-General to decide on promotions after consulting the Careers Committee. He is not challenging the Director-General's choice, but the Committee's recommendations, which were not in his view properly substantiated. The Director-General therefore did not have at his disposal all the facts he needed to make a proper choice. The Committee disregarded the general principles on promotion approved by the Administrative Council in that, among other things, it took no account of the three years' notional seniority granted to him on confirmation of his appointment. No staff member could possibly have completed more than four years' actual service at grade A6 by 1975 "since the Staff Regulations had been in force only since 1 January 1971 and I myself had been regraded at A6-1 (four months) from the date on which the new Staff Regulations came into force". In the complainant's view comparison of the merits of staff members at the same grade who were promoted in earlier years reveals discrimination against him which runs counter to the principle of equal career opportunities embodied in Article 5 of the Staff Regulations.

I. In conclusion the complainant asks the Tribunal to dismiss the Institute's arguments to quash the Careers Committee's recommendation and to order that a new committee review the matter of his promotion.

J. By communication of 8 October 1976 the Institute informed the Registrar of the Tribunal that it saw no need to answer the complainant's rejoinder.

## CONSIDERATIONS

As to the Tribunal's power of review:

1. The decision not to promote the complainant from grade A6 to grade A5 falls within the Director-General's discretionary authority. Hence the Tribunal will interfere with that decision only if 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 the decision is tainted with abuse of authority or if a clearly mistaken conclusion has been drawn from the facts.

As to the alleged procedural flaw:

2. The complainant contends in his original memorandum that he was not informed of the competent Careers Committee's recommendations for promotions from A6 to A5. Those recommendations were notified to him on 26 May 1976, and this grievance therefore now fails. The text was notified after his original memorandum but before his rejoinder had been lodged in other words he was able to refer to it in the course of the proceedings and so his right to a hearing has not been infringed.

As to the alleged error of law:

3. At its 127<sup>th</sup> Session (21-23 October 1975) the Administrative Council approved on the proposal of the Administrative Advisory Committee a text entitled "general principles governing promotion". Under section 2 of that text a staff member shall not normally be promoted from A6 to A5 unless he has served for an actual period of nine to ten years, including five at A6. The Institute states, and the complainant does not deny, that by 1975 he had actually served for only six years, including four at A6. The complainant points out that by 1975 no staff member could have served for more than four years at A6, since that grade was not created until 1971, when the new Staff Regulation came into force. But, even if that is true, in 1975 the complainant still did not meet the requirement of nine to ten years' actual total service. Moreover, he has not shown that his was an exceptional case warranting a departure from the rule.

4. There is no force in the complainant's criticisms of the criteria which the competent Careers Committee applied in recommending promotions from A6 to A5. The function of such committees is purely advisory, and the criteria they adopt have no binding force. Hence, even though those criteria are not beyond reproach, the Director-General's decisions are not tainted on that account.

5. It is immaterial that the criteria applied in 1975 were not the same as had been applied in earlier years. It is for the careers committees and for the Director-General to adapt the promotion criteria to the Institute's requirements. Hence the criteria may change from year to year and, since they do so, different staff members are differently treated according to the dates on which they receive promotion. Where there are administrative reasons for such difference in treatment, it is no breach of the principle of equality. The complainant had not shown that in his case the Director-General acted for any purpose but to serve the Institute's interests.

As to the allegation that essential facts were ignored:

6. There is nothing to suggest that the Director-General discounted facts in favour of promotion the complainant. In fact it appears from the text communicating the Careers Committee's recommendations that the Director-General studied the files of staff members who met the conditions for promotion laid down in the staff rules.

DECISION:

For the above reasons,

The complaint 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 6 June 1977.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet

1. Registry translation.