

In re BEERTEN

Judgment No. 313

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International Patent Institute by Mr. Francis Boni Beerten on 29 April 1976, the Institute's reply of 28 September, the complainant's rejoinder of 18 October and the Institute's surrejoinder of 26 October 1976;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 4, 6, 21, 24, 25, 30, 82 and 83 of the Institute Staff Regulations;

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. The complainant joined the staff of the Institute on 1 March 1971, when the former staff rules were in force, and on appointment was graded at scale IV. When the new Staff Regulations were brought into force he was graded at C2 (step 1 with zero seniority) as a clerk. On 1 January 1972 he was given a permanent appointment at grade C2, step 1, with twenty two months' seniority. He applied for a vacant post and on 1 May 1973 was appointed deputy administrative assistant at grade B5, step 3, with ten months' seniority. By decision of 6 February 1976 the Director-General promoted him "within his career pattern" to grade B4, step 2, with effect from 1 November 1975, and he was given four months' seniority at that step.

B. On 12 February 1976 the complainant lodged an internal appeal objecting to the period of seniority he had been granted. In the absence of the staff committee's nominees to the Appeals Committee the internal proceedings were suspended and on 29 April 1976, i.e. before the expiry of the limit of sixty days from the date on which the internal appeal was lodged, the complainant appealed to the Tribunal. He did so at the suggestion of the chairman of the Appeals Committee, so that the delay in the internal proceedings should not make his complaint time-barred. The Appeals Committee later resumed the proceedings and on 30 August 1976 made its recommendations to the Director-General, who endorsed them on 31 August and dismissed the appeal.

C. The complainant takes the view that had Article 30 of the Staff Regulations been properly applied he would have been given sixteen months' more seniority than he actually obtained at his new grade and step. He is apparently not challenging the accuracy of the calculations the Administration made to determine his seniority at his present grade and step, but he argues that in making them the Administration failed to take account of his seniority at the last step in his former grade and so infringed Article 30 of the Staff Regulations. He also refers to Article 25 of the Staff Regulations, which provides that staff members who do not hold permanent appointments at the basic grade must have two years' seniority to be eligible for promotion, and he contends that when he changed categories in 1973 the Administration acted in bad faith in grading him at B5, step 3, with ten months' seniority since it knew that he would reach the "ceiling" in his new grade before completing the minimum period which would make him eligible for promotion to grade B4. He complains that he suffered through not being promoted to grade B4 "in so far as such promotion would have entitled him to the biennial step increments provided for in Article 30 of the Staff Regulations".

D. In his claims for relief the complainant asks the Tribunal: (a) to quash the decision to promote him to grade B5 on 1 May 1973 and order the defendant organisation to promote him to grade B4, step 1, with zero seniority, with retroactive effect from 1 May 1973; (b) subsidiarily, to order the defendant organisation to grant him promotion to B4, step 2, with eighteen months' seniority on 1 November 1975; and (c) to award him 500 guilders as costs.

E. The Institute observes that the purpose of Article 30 of the Staff Regulations is to ensure that any staff member

who is promoted enjoys equal advantages on moving to the higher grade, whatever his seniority may have been at the step he reached in his former grade. The provisions of Article 30 constitute in themselves a rule applying the system of promotion laid down in the Staff Regulations. That system has two components: first, a right laid down in Article 24 to automatic and periodic advancement from the first to the last step in each grade; and, secondly, promotion to the next grade, which, according to Article 25, depends solely on selection. Under this system the right of each staff member to periodic increments in his basic salary is limited to the amount corresponding to the last step in his grade, in and when he is promoted on merit account should be taken, in determining the step and his seniority at that step in his new grade, of his acquired right to remuneration in his former grade. That right is reflected not only in the step he reached in his former grade but also in his seniority at that step inasmuch as such seniority ensures that within a fixed period he will obtain the salary pertaining to the next step. When a staff member has reached the last step in his grade, however, his right to advancement and to automatic salary increments is extinguished since his seniority at the last step then ceases to correspond to a salary increment. The Administration was therefore right to base the complainant's classification in his new grade on the salary pertaining to the last step in his former grade. He cannot properly contend that the Administration acted in bad faith in appointing him to grade B5, step 3, although it knew that such appointment would delay his advancement by step. Not only is the decision of 21 February 1974 now unchallengeable, but it respected the provisions of the Staff Regulations on promotion. Moreover, when he applied for a B5 post the complainant knew that the salary pertaining to the last step in B5 was lower than the highest salary he could attain in his former grade, C2, and so he deliberately preferred the opportunities for promotion, offered by appointment to category B to the certainty of advancement by step which he had already acquired in his former grade. The organisation notes that in his claims for relief the complainant asks for appointment to grade B4, the higher grade in the career pattern B5/B4, and points out that it would be quite out of keeping with the careers system introduced by Articles 4 and 6 of the Staff Regulations to appoint forthwith a staff member who changed categories to the top grade in the higher career pattern merely because of the level of payment he had attained in his former career pattern.

F. The Institute asks the Tribunal to dismiss the complaint in its entirety.

CONSIDERATIONS:

As to the receivability of the complaint:

1. On 6 February 1976 the Director-General promoted the complainant to grade B4, step 2, with effect from 1 November 1975 and with four months' seniority at that step. On 12 February the complainant asked the Director-General to review that decision and, should he refuse, to consider him to be lodging an internal appeal within the meaning of Article 82 of the Institute Staff Regulations. On 25 February 1976 the Director-General refused to review the decision and forwarded the appeal to the Appeals Committee. On 16 March 1976 the chairman of the committee told the complainant that the proceedings were suspended because of the resignation of the Staff Committee; should the Director-General fail to take a decision within sixty days of the lodging of the appeal, the time limit for filing a complaint with the Tribunal would start to run, no matter when the Appeals Committee eventually met and reported. In the absence of any further decision by the Director-General, on 29 April 1976 the complainant accordingly filed the complaint.

On 30 August 1976 the Appeals Committee recommended dismissing the appeal and on 31 August the Director-General endorsed that recommendation. The complainant did not afterwards file any complaint with the Tribunal.

The Tribunal is therefore called upon to consider the merits of the complaint filed on 29 April 1976. It is immaterial whether the advice the chairman of the Appeals Committee gave on 16 March 1976 was correct. A party should not suffer prejudice from acting on even the mistaken suggestion of an appeals body. Having followed the suggestion in the chairman's letter, the complainant cannot be taken to task for acting too soon and failing to file his complaint again after 31 August 1976, the date of the Director-General's decision. Besides, in his rejoinder he makes it quite plain that he abides by his original claims for relief.

2. The complaint is then receivable in principle; but in so far as it seeks the quashing of the decision to promote the complainant to grade B5 it is time-barred. That decision was taken on 21 February 1974 and, no appeal against it having been referred in time to the Appeals Committee and the Tribunal, has come into effect. The complainant's promotion to grade B5 cannot now be challenged.

As to the merits:

3. The Institute Staff Regulations provide for two distinct kinds of advancement. One is Promotion, or moving up from one grade to the next. The other is advancement by steps, within a grade. According to Article 25 promotion is by selection based on comparison of the merits of staff members with minimum seniority. As a rule minimum seniority is two years for staff members like the complainant who are no longer at the bottom grade of their category. According to Article 24 advancement by steps is automatic; it occurs after the staff member has two years' seniority at a given step but it inevitably stops at the last step in the grade.

On 21 February 1974 the complainant was promoted to grade B5, step 3, with effect from 1 May 1973 and with ten months' seniority. Fourteen months later he reached step 4, which is the last step in grade B5. Since by then he had two years' seniority in grade B5 he qualified for promotion to the next grade, B4, and on 6 February 1976 was indeed promoted to grade B4, step 2, with effect from 1 November 1975 and with four months' seniority. In his complaint he relies upon Article 30 of the Staff Regulations and says that he was not given the full seniority to which he was entitled.

According to Article 30(1)⁽¹⁾ "an official appointed to a higher grade shall be granted in his new grade seniority corresponding to the equivalent notional step or the next higher step

which he reached in his former grade, plus the amount of the biennial step increment in his new grade". Article 30(2) says that "For the purposes of applying this provision each grade comprises a series of notional steps corresponding to a series of notional monthly periods of seniority and salary rates which rise from the first to the last of the actual steps at the rate of one twenty-fourth of the biennial step increase in the grade in question". What has to be decided here is whether in calculating the complainant's seniority in grade B4 notional steps beyond step 4 in grade B5, the last step in that grade, should be taken into account. The complainant contends that they should, the Institute that they should not. That they should not is in keeping with the rules in force; that they should is not.

First, Article 30(2) refers in the first sentence to a series of notional steps corresponding to a series of periods of seniority and salary rates which progress from the first to the last of the actual steps. These last words alone suggest that on reaching step 4, the last actual step, in grade B5 the complainant lost his right to claim further notional steps.

Secondly, the complainant's contention does not square with the provisions of Article 30 quoted above. Taking account of notional steps is not an end in itself. The purpose is to give effect to the second sentence of Article 30(2), which reads*: "In no case shall an official be paid a lower basic salary in his new grade than he would have been paid in his former grade", and to Article 30(3), which reads*: "An official appointed to a higher grade shall be granted at least the first step in that grade." For these provisions to be respected account must be taken of the notional steps provided for within an actual step. On the other hand, there are no grounds for adding notional steps to the last actual step in the lower grade: that would confer on the official a benefit which plainly does not meet the intention underlying Article 30.

Thirdly, if the complainant's interpretation were right, the distinction drawn in the Staff Regulations between advancement by grade and advancement by step would be blurred. A staff member promoted to a higher grade would be granted fictitious seniority: he would be taken to have reached a step which in fact he had not. This method of calculation would affect the position of the promoted official. It would therefore detract from the Director-General's discretionary authority not only to promote someone from one grade to another but also to say what place he shall hold in his new grade.

Besides, the complainant is not alleging any breach of the second sentence of Article 30(3): he is not saying that he was paid "a lower basic salary in his new grade than he would have been paid in his former grade". Moreover, he was given step 2 in grade B4 and so fared at least as well as Article 30(3) stipulates.

4. In his rejoinder the complainant refers to a practice current until 1973. He is mistaken in doing so since the promotion he received on 1 May in that year is no longer challengeable. In his rejoinder he also relies upon Article 21 of the Staff Regulations. That article relates to staff on recruitment, not to officials like the complainant who are promoted from one grade to another.

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 21 November 1977.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet

1. Registry translation.