

FORTY-SIXTH ORDINARY SESSION

***In re* LEGER and PEETERS**

Judgment No. 457

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaints brought against the European Patent Organisation (EPO) by Mr. Michel Gustave Marie Léger and Mr. B.J. Peeters on 10 June 1980, the EPO's replies of 22 August, the complainants' rejoinders of 23 October and the EPO's surrejoinders of 29 December 1980;

Considering that the two complaints relate to the same matters and should be joined to form the subject of a single decision;

Considering Articles II, paragraph 5, and VII, paragraph 3 of the Statute of the Tribunal, Articles 49 and 109(2) of the Staff Regulations of the European Patent Office and the memorandum of the President of the EPO dated 23 October 1979;

Having examined the written evidence, 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. Mr. Léger was appointed to the staff of the International Patent Institute on 16 August 1967 and Mr. Peeters on 1 June 1970. On 1 January 1974 they obtained grade A7 and, the Institute having been incorporated into the European Patent Office, were regraded A2 in the Office with effect from 1 January 1978. On 29 August 1979 the President of the EPO set up a Promotion Committee to select the grade A2 staff members to be promoted to A3. The Committee reviewed a list of candidates which included the complainants, and reported on 14 December 1979 in accordance with Article 49 of the Staff Regulations and the President's memorandum of 23 October 1979. The report was based on review of the annual performance reports for 1976, 1977 and 1979 and named several staff members, in order of merit, as qualifying for promotion. The President published the list of promotions in accordance with the Committee's recommendations. The complainants were not on the list. Mr. Léger appealed to the President on 15 January 1980 and Mr. Peeters on 19 February. The President took no decision within the two-month time limit set in Article 109(2) of the Staff Regulations, and the complainants filed complaints with the Tribunal under Article VII, paragraph 3, of its Statute against the decision of 14 December 1979 notified to them on 17 December.

B. The complainants argue that the President was bound by the selection criteria which he set for the Committee in his memorandum of 23 October 1979. The application of additional criteria is, in their view, a misuse of authority. They believe that according to the prescribed criteria they were as fully qualified as the other applicants. They had the requisite seniority and during the material period their services had been found fully satisfactory. Their educational qualifications also met the criteria.

C. The complainants invite the Tribunal to quash the decision not to promote them, to order their promotion to A3 from 1 January 1979 and, subsidiarily, to order that the matter be sent back to the Promotion Committee for a further report and to award each of them 500 guilders in costs.

D. The EPO states in its reply that the complainants do not have the seniority required according to the criteria set out in paragraph A of the memorandum of 23 October 1979. Service prior to 31 December 1973 was counted only to the extent of 50 per cent since when recruited the complainants were in category B and did not reach category A until 1 January 1974. Nor could account be taken of their experience before joining the staff of the International Patent Institute. The EPO therefore asks the Tribunal to dismiss the complaints as unfounded.

E. In their rejoinders the complainants challenge the Committee's report, which in their original memoranda they

ask The EPO to produce and which the EPO appends to its reply.

They believe that the decision of the President which they are impugning is tainted with the errors which vitiate the Committee's report. Those errors consisted in discounting the complainants' experience before joining the staff of the Institute and the nature of their duties before they reached category A, except in so far as they could be directly assimilated to those of category A. The President's memorandum did not state any such limitation. Their university education is of the required standard and on promotion to category A they were not transferred to any other technical field. On 6 August 1973 their unit chief stated that Mr. Peeters was performing "functions of the same nature and standard as category A staff members in the same unit". On 13 August he made a similar statement about Mr. Léger.

F. In its surrejoinder the EPO observes that the complainants' background - they are technical, not industrial, engineers - qualified them only for category B on recruitment. The duties they performed as examining Officers in that category up to 31 December 1973, unlike the category A posts, did not call for more advanced training. That is why the Committee unanimously decided to take account of only 50 per cent of their category B service. The unit chief's statements, which they cite, were made just to suit them and have no evidentiary value.

CONSIDERATIONS:

1. In their complaints, which are dated 10 June 1980, Mr. Léger and Mr. Peeters invite the Tribunal:

(a) to quash the decision notified on 17 December 1979 and order their promotion to A3 from 1 January 1979;

(b) subsidiarily, to order that the matter be sent back to the Promotion Committee for a further report and to award each of them 500 guilders in costs.

2. The Promotion Committee set up by the President of the EPO reported on 14 December 1979. Of the 138 staff members included in the list of those who qualified for promotion the Committee recommended 57 for actual promotion. The complainants appeared in the list of those who were not to be promoted.

3. On learning that they were not included in the list of promotions notified on 17 December 1979 the complainants addressed an appeal on 15 June 1980 - within the time limits - to the President of the EPO. They invited him to reconsider and review the decision not to promote them. The President having taken no decision on the matter within the sixty-day time limit, the complaints are receivable under Article VII, paragraph 3, of the Statute of the Tribunal.

4. In his memorandum dated 23 October 1979 to the Chairman of the Promotion Committee the President of the EPO stated the main criteria the Committee was to follow in recommending promotions. These instructions required the drawing up of two separate lists of candidates and set out the qualifications for promotion:

(a) list A was to include officials who by 1979 had completed not less than eight years of service;

(b) list B, for which a second set of qualifications was laid down, is immaterial, the complainants' case being based exclusively on the criteria for admission to list A.

The President of the EPO also gave instructions in his memorandum for calculating seniority, and the dispute in this case turns on their application.

The purpose of the criteria in the memorandum was to provide guidance to the Promotion Committee in making recommendations to the President.

It is stated quite clearly in the memorandum that the President takes the final decision on promotions in the light of the lists and the substantiated recommendations appended thereto.

5. A final decision of that kind falls squarely within the scope of his discretion, and the Tribunal will set it aside only if it was taken without authority or was tainted with a formal or procedural flaw, or if it was based on a mistake of fact or of law, or if essential facts were left out of account, or if there was misuse of authority, or if clearly mistaken conclusions were drawn from the facts.

6. The complainants base their claims on paragraphs A.1 and B.c) of the President's memorandum, which read as follows⁽¹⁾:

"A.1. Officials whose performance in a category A position is good or very good may be promoted provided they have completed not less than eight year; of service;

B.e). Earlier experience counts half time - one half year for one year - when it appears useful to the work of the Organisation, that is to say when it has given the official knowledge which is useful in his present duties (for example, industrial experience such as research...) in a category A position (documentary research on patents outside the Office being treated as category A work)."

The complainants object to the President's having applied additional criteria and they allege that that constituted an abuse of authority mainly on the grounds that he miscalculated their length of service.

In fact the President decided that the complainants had not completed the eight years of service required in his memorandum. He counted the period of service previous to 31 December 1973 only to the extent of 50 per cent, observing that the complainants had not reached category A until 1 January 1974. He also refused to take account of their experience before joining the staff of the International Patent Institute. In doing so he rejected the same arguments which the complainants now put forward in support of their claim.

7. The Tribunal has no reason to question the accuracy of the calculation of the length of the complainants' service. The Promotion Committee's recommendations and appended comments were drafted with due care. As to the recognition of earlier service the Committee states: "The Committee members feel obliged ... to point out that, in strict compliance with the criteria for recognition of earlier service they have discounted duties which could not be directly assimilated to those of category A." Here it is worth observing that the text of the instructions addressed to the Committee allows it some degree of discretion. There is no mistaken appraisal of facts which vitiates the Committee's decision on the complainants' case. The critical point is that, according to its legal attributes, the Committee can merely make recommendations and while the President of the EPO may endorse them he is not bound to do so. In this instance he reviewed the matter himself and he chose to endorse the recommendations. He was entitled to rely on the technical competence, experience and sense of fairness of the Committee members, who had the important task of striking a fair balance between the two categories and ensuring that their right to equal treatment was not infringed by discrimination in favour of or against any staff members. The complainants have misconstrued the way in which the President exercised his broad discretionary authority. The essential point is that length of service will be taken into account on the condition that earlier experience appears useful to the work of the Organisation (paragraph B.c) of the memorandum) and it is for the President of the EPO to settle this matter.

The Tribunal conclude that there are no ground for finding that the President abused his discretionary authority.

DECISION:

For the above reasons,

The complaints are dismissed.

In witness of this Judgment by Mr. André Grisel, President, the Right Honourable Lord Devlin, P.C., Judge, and Mr. Hubert Armbruster, Deputy Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Allan Gardner, Assistant Registrar of the Tribunal.

Delivered in public sitting in Geneva on 14 May 1981.

André Grisel
Devlin
H. Armbruster

A.B. Gardner

1. Registry translation.

