

## SEVENTY-SECOND SESSION

### *In re* WEST (No. 11)

#### Judgment 1137

THE ADMINISTRATIVE TRIBUNAL,

Considering the eleventh complaint filed by Mr. Julian Michael West against the European Patent Organisation (EPO) on 14 May 1991, the EPO's reply of 1 August and the complainant's letter of 23 August 1991 informing the Registrar of the Tribunal that he did not wish to rejoin;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 47(1), 106(2) and 108 of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. As the Tribunal explained under 2 in Judgment 847, on the complainant's eighth complaint, a patent examiner at the EPO is each year given a general rating of his performance. According to the guidelines on promotion (CA/20/80) which the President of the Office issued on 3 April 1980, he will qualify for promotion once he has a minimum number of years of seniority, and the number varies with the quality of the rating. The list of examiners in line for promotion is drawn up each year and put to a promotion board which makes recommendations to the President of the Office for actual promotion. An examiner at grade A3 with a general rating of 2 ("very good") is required according to the guidelines to have between 15 and 18 years' seniority to qualify for promotion to A4.

The complainant took up duty at the EPO's headquarters in Munich in 1982 as a substantive examiner of patents at grade A3 and by 1988 his seniority as reckoned for the purpose of promotion came to 17 years.

The Promotion Board for 1988, meeting on 29 June of that year, did not recommend him for promotion.

As approved by his supervisors on 24 August 1989 his staff report for 1986-87, issued under Article 47(1) of the Service Regulations, gave his performance a general rating of 2. On 8 September 1989 he submitted to the President of the Office a request under Article 106(2) of the Service Regulations for a decision that in the light of that rating he ought to have been promoted to A4 in 1988. Having got no answer, he lodged an internal appeal under Article 108 against the implied refusal of his request.

By a letter of 21 December 1989 the Director of the Personnel Directorate informed him that the President had promoted him to A4 as from 1 May 1989.

In a second internal appeal, dated 9 March 1990, he objected to not being promoted as from 1 May 1988.

At the President's instigation the Promotion Board for 1988 met again to review his case. In a report dated 10 July 1990 it said that on comparing him with others who had the same seniority but whom it had recommended for promotion in 1988 it saw "no reason to change its previous recommendation" or to recommend backdating his promotion to 1988.

His staff report for 1988, which did not become final until 12 July 1990, again gave him a general rating of 2.

In its report of 14 January 1991 the Appeals Committee held that 17 years' seniority and a "very good" rating were "only two requirements" for promotion and that the Promotion Board had properly taken other factors into account; it recommended rejecting the complainant's two appeals as unfounded. The President did so, the Principal Director of Personnel so informed him in a letter of 15 February 1991,

and that is the decision he is impugning.

B. The complainant observes that by 1988 he had 17 years' seniority - a figure near the top of the required range - and his staff report for 1988 gave him a general rating of 2. He was therefore entitled to promotion to A4 in that year and should not have had to wait for it until 1989.

In 1988 at least four other examiners, whom he names, and of whom three had the same seniority as he or slightly less, were promoted to A4 on the strength of a rating of 2. He was therefore discriminated against.

The Promotion Board for 1988 made wrong assumptions in its report of 10 July 1990. First, it took the view that the final version of the staff report for 1986-87 replaced an earlier report with a general rating of only 3 ("good"). But there is no such earlier report in the complainant's file, and in assuming that there was it committed a procedural error. Secondly, its comparison of him with other examiners was based on a presentation of facts that was distorted to his detriment.

For example, its adding plus signs to the ratings was inadmissible according to the three relevant criteria of age, performance and seniority, and a correct and objective presentation shows no significant difference between him and the others.

He wants his promotion to A4 to date from 1 May 1988 and he seeks an award of costs.

C. In its reply the EPO submits that the Tribunal exercises only a limited power of review over a decision of promotion, which is at the President's discretion. So it will neither review the records of the candidates a promotion board was considering nor replace the President's assessment of them with its own. As it has held in earlier cases, the mere acquisition of seniority confers no entitlement to promotion, which can never be automatic. In choosing between candidates a promotion board and the President may take into account, not just the general rating in the latest staff report, but all factors of performance, also in periods prior to the one covered by the latest report, and any other appropriate criteria. The original basis for comparison of candidates by the Promotion Board in this case is indeed a table showing age, seniority and ratings. But the full information in staff reports is also important, and that is why the table adds plus signs, where appropriate, to the rating and takes reports over a period of several years. Another relevant factor is not just reckonable experience but seniority in the EPO.

Of the four other examiners two were older and senior; one, though no more senior, was older and had better ratings; and the fourth, though rated much the same, was slightly older, had rather more experience and had been in the EPO two years longer. The differences show that there was no breach of the principle of equality in preferring the others to the complainant.

His contention that the Promotion Board drew wrong assumptions is quite unfounded, for the reasons the Appeals Committee set out in its report.

#### CONSIDERATIONS:

1. This is a dispute about the date at which the complainant, a substantive examiner of patents at the EPO, ought to have been promoted from grade A3 to A4. He claims 1 May 1988, one year earlier than the date the Organisation actually took.

As is explained in A above, an A3 examiner who gets a general rating of 2 ("very good") for his performance must have between 15 and 18 years' seniority to qualify for promotion to A4.

By 1988 the complainant's seniority as reckoned for the purpose of promotion came to 17 years; and his supervisors gave him a general rating of 2 in his staff report for 1986-87.

In its report of 14 January 1991 the Appeals Committee recommended rejecting his claims on the grounds that the minimum of 17 years' seniority and the rating of 2 were "only two requirements" for promotion and that the Promotion Board for 1988 had properly taken other factors into account. The President endorsed that view, and the issue is whether his decision to promote the complainant to A4 only from 1 May 1989, rather than from 1 May 1988, was lawful.

2. Only on the limited grounds often stated in the case law will the Tribunal interfere with discretionary decisions such as one to promote an official. Such grounds are lack

of authority, a formal or procedural flaw, disregard of an essential fact, a mistaken deduction from the evidence, a mistake of fact or law, and abuse of authority. So the Tribunal will, for example, neither review the records of the candidates a promotion board was considering nor replace the President's assessment of them with its own.

The complainant makes out, first, that he was discriminated against because at least four other examiners with a general rating of 2, three of whom had the same seniority as

he or even slightly less, were promoted to A4 in 1988; and, secondly, that in its supplementary report of 10 July 1990 the Promotion Board for 1988 made the wrong assumptions that are summed up in the third paragraph of B above.

3. The plea of discrimination fails. It overlooks the fact that seniority merely qualifies an examiner for promotion and confers no right: promotion is not a foregone conclusion. As the Organisation says, in choosing between candidates the Promotion Board and the President are free to take into account not just the latest general ratings but of performance in earlier periods as well, and to adopt, subject to limited review by the Tribunal on the grounds set out above, any other criteria they think appropriate. Though the original basis for the comparison of candidates by the Promotion Board for 1988 was the table showing their age, seniority and ratings it was proper to treat as relevant the full information in staff reports and other factors such as seniority of service in

the EPO.

The EPO submits, and the complainant does not deny, that of the four other examiners whose cases he cites by way of comparison two were older and senior; the third, though not senior, was older and had better ratings; and the fourth, though rated much the same, was slightly older, had rather more experience and had served in the EPO two years longer. Such factual differences warrant the conclusion that the complainant was not discriminated against.

4. As for his plea that the Promotion Board made errors, the Tribunal is not satisfied on the evidence before it that any error that the Board may have committed is such as to make unlawful the decision impugned.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Tun Mohamed Suffian, Vice-President of the Tribunal, Miss Mella Carroll, Judge, and Mr. José Maria Ruda, Deputy Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 29 January 1992.

Mohamed Suffian  
Mella Carroll  
José Maria Ruda  
A.B. Gardner