

## SEVENTY-NINTH SESSION

### *In re* VAN DER PEET (No. 19)

#### Judgment 1439

THE ADMINISTRATIVE TRIBUNAL,

Considering the nineteenth complaint filed by Mr. Hendricus van der Peet against the European Patent Organisation (EPO) on 11 August 1994, the EPO's reply of 6 December, the complainant's rejoinder of 19 December 1994, the Organisation's surrejoinder of 1 February 1995, the supplement filed by the EPO on 29 March to its surrejoinder, the complainant's comments of 25 April on that supplement, and the Organisation's final comments of 2 May 1995;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

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

A. The complainant, a Dutch citizen, is employed by the EPO at its Directorate-General 4 in Munich as a patent examiner at grade A3. In October 1991 the Administration started disciplinary proceedings against him on the grounds of breach of Article 14 of the Service Regulations. Further information on those proceedings and the sanction later imposed on him appears under A in Judgment 1391 on his eighteenth complaint.

In a letter dated 19 August 1993 he asked the President of the European Patent Office, the secretariat of the EPO, for information about a promotion he was expecting to grade A4 in 1993. By a letter of 28 September 1993 the President told him that a staff member could not "in principle" be promoted as long as there was any reference to a disciplinary measure in his personal file.

The complainant appealed against the President's decision on 30 September 1993. In its report of 31 May 1994 the Appeals Committee recommended rejecting his appeal.

By a letter of 6 July 1994, which he is impugning, the Director of Staff Policy told the complainant that the President had decided to endorse the Committee's recommendation.

B. The complainant submits that to deny him promotion is unlawful. He has two sets of pleas. The first set, which is summed up under B and D in Judgment 1391, seeks to establish that the disciplinary measure on which the impugned decision rests is "null and void". His other pleas are confined to flaws which, he alleges, taint the impugned decision itself.

The Administration acted in breach both of the rule against double jeopardy and of *nulla poena sine lege* by imposing a "further punishment" on him for which there is no provision in the Service Regulations. Law-making authority being vested in the Administrative Council, the President's decision was *ultra vires*.

There was a procedural flaw in the conduct of the internal appeal. The complainant asked the Appeals Committee to bar members of the Legal Department from the proceedings because of their "personal interest" in victimising him. The Committee's refusal is evidence that it is at the President's "beck and call".

He seeks promotion to grade A4 as from "the date on which the Promotion Board recommended such promotion", compensation for "pecuniary loss and damages caused by his illegal exclusion from promotion", 50,000 German marks in moral damages and 6,000 marks in costs.

C. In its reply the EPO maintains that the impugned decision was a proper exercise of discretion. Promotion is a reward for general performance, and that includes "conduct" as well as carrying out duties. Since the disciplinary measures set out in Article 93(2) of the Service Regulations do not include "non-promotion", the complainant is wrong to treat it as a hidden disciplinary sanction. Besides, if he changes his "attitude" he will be eligible for promotion "before long".

As to his attacks on the Appeals Committee the EPO points out that the Committee is an independent body that conducts its hearings as it sees fit.

D. In his rejoinder the complainant refutes the Organisation's submissions and presses his claims. Whatever change in "attitude" the Administration may expect of him, such a condition is arbitrary.

E. In its surrejoinder the EPO observes that in deciding whether to promote an official whose performance appraisals, seniority and age qualify him for promotion the President is free to rely on such other criteria "as are justified". The attitude the Administration expects from the complainant is one in keeping with his "position and obligations" as an international civil servant.

F. In its supplementary brief the Organisation informs the Tribunal that in the light of Judgment 1391 it promoted the complainant, by a decision of 24 February 1995, to grade A4 as from 1 July 1993.

G. In comments on that brief the complainant maintains that the promotion to grade A4 as from 1 July 1993 fails to give him satisfaction: the Administration should have promoted him as from 1991 or, subsidiarily, 1992.

H. In its final comments the Organisation points out that the present dispute concerns the complainant's promotion in 1993. His new claims to promotion as from 1991 or 1992 are irreceivable.

#### CONSIDERATIONS:

1. The complainant was the subject of disciplinary action consisting in relegation in step within his grade as from 1 April 1992. In his eighteenth complaint, which he filed on 17 March 1994, he appealed to the Tribunal against the decision, and that complaint was pending at the date when he lodged this one.

2. By a letter of 19 August 1993 he had claimed promotion to grade A4 in 1993. But, even though he fulfilled the requirements as to record of performance, reckonable experience and age, the President of the European Patent Office explained in a reply of 28 September 1993 that he had decided because of the disciplinary measure not to promote the complainant to A4 in 1993. On 30 September 1993 he lodged an internal appeal against that decision and on 22 November his appeal was referred to the Appeals Committee. In its report of 31 May 1994 the Committee unanimously recommended rejecting his appeal. The President accepted the recommendation and by a letter of 6 July 1994 the Director of Staff Policy informed him that the President had decided, "for the reasons set out during the appeals procedure and in accordance with the unanimous opinion of the Committee", to reject his appeal. That is the decision he impugns.

3. In Judgment 1391, which it delivered on 1 February 1995, the Tribunal allowed Mr. van der Peet's eighteenth complaint. It held that only if the staff member's conduct amounted to abuse of process or to perversion of the right of appeal would disciplinary action be justified. So it set aside the impugned decision to impose the disciplinary penalty on the complainant.

4. On 24 February 1995 the President of the Office decided in the light of Judgment 1391 to promote the complainant to grade A4 with effect from 1 July 1993. The complainant received the text of that decision on 1 March 1995 and the EPO informed the Tribunal of it in the supplement dated 29 March to its surrejoinder.

5. The relief which the complainant seeks is:

- (1) promotion to A4 as from the date "on which the Promotion Board recommended such promotion";
- (2) material damages;
- (3) moral damages amounting to 50,000 German marks; and
- (4) costs amounting to 6,000 marks.

6. The complainant does not specify the date which the Promotion Board recommended for his promotion, and it is not clear from the file. But in a letter he wrote to the Director of Personnel Administration on 1 March 1995 after receiving notice of promotion he asked that the effective date should be 1 January or 1 July 1991 or, "as an auxiliary request", 1 January or 1 July 1992; failing that, his letter was to be treated as an internal appeal. By a

letter of 26 April 1995 the Director of Staff Policy informed him that his claims were rejected and were being referred to the Appeals Committee. That internal appeal is still pending.

7. In his further comments of 25 April 1995 to the Tribunal he says that promotion only as from 1 July 1993 does not give him satisfaction. But, as the Organisation has pointed out in its final brief, what he asked for in his letter of 19 August 1993 was promotion to A4 in 1993, that was the subject of his internal appeal of 30 September 1993, and that too is the subject of the present complaint.

8. The grant of promotion with effect from 1 July 1993 is an administrative decision which the complainant was entitled to challenge and has challenged. If the date recommended by the Promotion Board for his promotion was 1 July 1993 or some later date the complainant has received full satisfaction of claim (1). If the recommended date was earlier than 1 July 1993, the question arises whether the President should have accepted it. There are also the complainant's new claims - in his letter of 1 March 1995 mentioned in 6 above - to promotion as from 1991 or 1992. Those matters now arise in the context of his internal appeal against the President's decision of 24 February 1995.

9. Insofar as this complaint is concerned - apart from the matter of the date of promotion, which must await the outcome of the internal appeal procedure - the complainant has received satisfaction in the form of promotion, which will automatically carry the right to payment of arrears of pay. That affords him adequate compensation. As to his claim to moral damages, there is no reason to award him any. The delay in granting him promotion caused him no moral injury because the Organisation acted in good faith in originally deciding not to promote him.

10. The complainant is entitled to costs, and the Tribunal sets the amount at 500 German marks.

#### DECISION:

For the above reasons,

1. The complainant is awarded 500 German marks in costs.
2. His other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

William Douglas  
Mella Carroll  
Mark Fernando  
A.B. Gardner