

In re LEDRUT and BIGGIO

Judgment No. 300

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Patent Institute drawn up by Mr. Pascal Fabien Christian Ledrut on 28 April 1976 and the complaint drawn up by Mr. Carlo Giuseppe Federico Biggio on 30 April and brought into conformity with the Rules of Court on 4 June, the Institute's single reply of 24 June to both complaints, Mr. Ledrut's rejoinder of 19 August 1976, the Institute's surrejoinder thereto of 22 September, Mr. Biggio's rejoinder of 29 September, and the Institute's surrejoinder thereto of 3 November 1976;

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

Considering the applications to intervene lodged by

Mr. Michel Georges Armitano-Grivel,
Mr. Frans Louis Bogaert,
Mr. Félix Noël Borrelly,
Mr. Marc Julien Dekeirel,
Mr. Joël André Descamps,
Mr. Gérard Jean-Pierre Giroud,
Mr. Winfried Marie Emiel Hoornaert,
Mr. Paul Jules Marie Ramboer,
Mr. Guy François Steib,
Mr. Alain Maurice Joseph Van Moer,
Mr. Marc Robert Julien Villemin;

Considering Article II, paragraph 5, of the Statute of the Tribunal, Institute Staff Regulations 4, 5, 6, 8, 18, 21 and 24 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. Mr. Ledrut was appointed to the Institute staff on 1 March, and Mr. Biggio on 1 July 1972, as examiners. Because they were given two years' seniority on the grounds of previous service, they were each originally grades at A7, step 1, with twelve months' seniority at that step. On 5 February 1976 the list of staff promotions for 1975 was posted on the Institute premises. The complainants did not appear in the list of promotions to A6, and each of them appealed to the Director-General and then to the Tribunal. By letter of 26 May 1976, after they had filed their complaints, the Director-General sent them a copy of the staff circular notifying the roster of promotions proposed by the Careers Committee and told them that, after checking their files, he agreed with the Committee that there was no reason to promote them.

B. In his complaint, as supplemented by his rejoinder, Mr. Ledrut contends that the Institute has respected neither his acquired right to enjoy all the benefits deriving from his original appointment at grade A7, step 1, with twelve months' seniority; nor his contract of appointment; nor the principle that he and staff members with the same seniority in his grade should have equal career opportunities; nor the principle that he and staff members of equal merit and with equal length of actual service at grade A7 should have equal minimum career prospects. He takes the view that such "breaches" in effect meant a retroactive downgrading at the date of his appointment from A7 to A8 and so barred his promotion. He asks the Tribunal to quash, in so far as it relates to him, the decision of 5 February 1976, which "by endorsing the above-mentioned breaches of law constituted an abuse of authority", and

to order review of that decision.

C. In his complaint, as supplemented by his rejoinder, Mr. Biggio asks the Tribunal to find that he qualifies for promotion from A7 to A6 by the criteria applied in 1975 and previous years; to declare that he should therefore be promoted to A6 not later than 1 July 1975, the date on which he reached the third step in A7; to find that the Director-General "endorsed the Reports Committee's view that it was impossible to correct the mistakes made in 1974 in marking the complainant's performance"; to quash the Director-General's decision of 5 February 1976 to promote examiners from A7 to A6 on the grounds that it was based on performance reports which were not comparable and that in refusing to promote the complainant the Director-General committed "errors of law and of fact and abuse of authority and drew clearly mistaken conclusions from the dossier"; to declare that a new decision should be taken on the basis of a new report by the Careers Committee "after correcting the application of the general criteria and mistakes in the marking of performance"; and to order the Institute to pay the complainant 5,000 French francs as costs plus interest at 6 per cent a year on salary arrears with effect from 1 July 1975.

D. The Institute contends that in general, according to the Staff Regulations, promotion is the result of a choice which falls within the Director-General's discretion. The Director-general followed the general principles on promotion approved by the Administrative Council, studied the files and on the Careers Committee's recommendation decided not to promote the complainants. He took that decision after comparing the merits of staff members eligible for promotion and in the exercise of his discretionary authority. In asserting a "right" to promotion the complainants cannot rely on their performance marks or the steps to which, partly owing to seniority benefits, they had been appointed within grade A7. The Director-General based promotions for 1975 on an order of merit and not on the application of criteria. The complainants refer to the criteria for promotion applied in earlier years, but the Director-General is not bound to apply such criteria, which would mean surrendering his discretionary authority. In any case if the merits of the complainants are compared with those of staff members in the same grade promoted in earlier years there is nothing to suggest that the complainants suffered any discrimination in practice. Mr. Biggio alleges that the rules on performance marking were misapplied in 1974; the Institute replies that the performance reports for 1974 are now final. Besides, Mr. Biggio offers no shred of proof to bear out his allegation that he was less fairly treated in the marking than other staff members.

E. The Institute accordingly asks the Tribunal to dismiss the complainants' claims for relief as being utterly unfounded.

CONSIDERATIONS:

As to the Tribunal's power of review:

1. The decision not to promote the complainants from grade A7 to grade A6 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 errors of law:

2. In 1972 the complainants were appointed at grade A7 and given one year's seniority. Thus by 1975 they had completed only three years' actual service at the Institute. Hence in 1975, according to the general principles drawn up by the Administrative Advisory Committee and approved by the Administrative Council, they were not normally entitled to promotion from A7 to A6, such promotion being as a rule reserved for staff members who had completed "at least four years' actual service" in the Institute. The complainants argue that it was unlawful to put a literal construction on the requirement of four years' actual service, and not to put on a par with staff members who met that requirement any who could point to three years' actual service plus one year's seniority benefit. The argument that an error of law was committed is, however, mistaken.

It is true that under Article 5 of the Staff Regulations⁽¹⁾ "staff members belonging to the same category are subject to identical conditions of recruitment and career patterns". But the principle of equality laid down in that article does not mean that seniority benefit is to be equated to actual service for the purpose of determining entitlement to promotion. In deciding whether to promote a staff member one must ask not only "what are his merits?" but also "what is his period of actual service?". To take account of actual service is to reward staff members for loyalty and

induce them to stay on. In any case experience gained from actual service to the Institute is worth more than experience betokened by the grant of a seniority benefit on appointment.

3. The complainants rely upon Articles 21 and 25 of the Staff Regulations, but misconstrue them. It is true that according to Article 21(2)* "the Director-General may, so as to take account of the training and special occupational experience of a new staff member, grant him a seniority benefit and so ensure his appointment to the next higher grade". But that provision does not mean that the grant of a seniority benefit should have any effect on regradings subsequent to appointment. Again, it is not clear from Article 25(2), which makes "a minimum period of service" a requirement for promotion, whether or not actual service is meant. The provision may therefore properly bear the interpretation put upon it by the Director-General.

4. The complainants cannot properly allege any breach of their acquired rights, i.e. the terms of their appointment. At best such an allegation might be allowed if the seniority granted to the complainants on appointment had not conferred any benefit upon them. But it did, since on appointment they were paid a higher salary than others appointed at the same time but given no seniority benefit.

5. It is immaterial that the complainants would have been promoted in 1975 had the same criteria been applied as in 1973 and 1974. It is for the careers committees and for the Director-General to adapt the conditions of promotion to the Institute's requirements. Hence those conditions 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 complainants have not shown that in their cases the Director-General acted for any purpose but to serve the Institute's interests.

As to the allegation that essential facts were ignored:

6. The complainants contend that the Director-General failed to take account of facts which were favourable to them in deciding on promotions for 1975. That is a mere allegation which there is nothing in the dossier to support. On the contrary, as appears from a circular addressed to the staff on 26 May 1976, the Director-General himself studied the files of staff members who met the prescribed conditions for promotion from A7 to A6.

As to the allegation that mistaken conclusions were drawn from the dossier:

7. The complainants object to the system of performance marking which, in their view, was not consistently applied throughout the Institute. It is true that marking may partly depend on subjective factors which have little or nothing to do with actual performance, but the complainants have not shown that they suffered on that account.

8. Mr. Biggio also maintains that the Director-General disregarded the principle of equality in following the promotion roster drawn up by the competent Careers Committee. In fact, according to the staff circular of 26 May 1976, by studying the files of all category A staff members concerned "the Director-General has been able to uphold the careers committees' view on one point, namely that staff members listed in the promotion rosters should in any event be promoted before those who are not". There is nothing to suggest that in that respect the Director-General committed any abuse of his discretionary authority.

9. Lastly, Mr. Biggio contends that the impugned decision is flawed because of the mark he obtained in 1974. The Reports Committee did not rule out the possibility that his mark might have been wrong, but nevertheless recommended approving it. Moreover, the complainant did not appeal against the Director-General's decision on that point, and it is no longer open to him to do so.

As to the applications to intervene:

10. Since the complainants' claims for relief are dismissed in their entirety, so too are the applications to intervene, of which the receivability need not therefore be considered.

DECISION:

For the above reasons,

The complaints and the applications to intervene are 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.

Updated by PFR. Approved by CC. Last update: 7 July 2000.