

## SIXTY-FOURTH SESSION

### *In re* WEST (No. 9)

#### Judgment 884

THE ADMINISTRATIVE TRIBUNAL,

Considering the ninth complaint filed by Mr. Julian Michael West against the European Patent Organisation (EPO) on 23 May 1987, the EPO's reply of 10 August, the complainant's rejoinder of 11 September and the EPO's surrejoinder of 30 November 1987;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Article 11(2) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

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

A. In 1982 the complainant began service with the EPO in Munich as a substantive examiner of patents at grade A3. In his eighth complaint he objected to the reckoning of his experience as at 1 January 1985 made on 15 September 1985 for the purpose of determining his seniority for promotion. He asked that his seniority for promotion match his position on 1 January 1985 - step 10 with 4 months' seniority - and be put at 17 years and 4 months as at that date. In Judgment 847 of 10 December 1987 the Tribunal dismissed that claim. On 29 July 1986 he had lodged an internal appeal against the decision not to promote him to A4 in 1986. The Appeals Committee, to which his appeal had been referred, unanimously recommended rejecting it, and by a letter of 4 May 1987, the final decision impugned, the Principal Director of Personnel informed the complainant that the President had done so.

B. In his original brief, filed before the Tribunal delivered Judgment 847, the complainant develops the contention he put forward in his eighth complaint that the reckoning of his seniority for promotion should have been 17 years and 4 months as at 1 January 1985. He cites Article 11(2) of the EPO Service Regulations and the guidelines notified to EPO staff in circular 144 of 2 September 1985 for the reckoning of such seniority. Observing that the EPO applied to him the rule that discounts experience gained before the age of 25 years, he challenges its validity on the grounds that it does not appear in the new guidelines which he presumes replaced all earlier ones. He submits that if correctly reckoned his seniority for promotion would have come to 19 years by 1 September 1986. He cites guidelines approved by the Administrative Council of the EPO in June 1980 in paragraph 259 of CA/PV.8. That paragraph required some 20 years' experience for someone whose performance was rated "good", as his was, and 12 to 18 years for someone whose performance was better than that. He submits that in fact for someone in his position the period must range from 19 to 21 years, without discounting any experience he gained before the age of 25. Indeed the promotion board did promote to A4 in 1986 two examiners whose rating was no better than his and who had only 19 years' experience. The principle of equal treatment requires that he too be promoted. He claims promotion to A4 from 1 September 1986 and an award of 2,000 Deutschmarks in costs.

C. In its reply the EPO seeks to refute the complainant's contention that his seniority for promotion was wrongly reckoned and puts forward the arguments it already advanced in reply to his eighth complaint and which are summed up in Judgment 847, under C. It asks the Tribunal to reject that contention. In case it should not, the Organisation argues in the alternative that the complaint is unfounded. It submits that the 25-year rule, which came into effect in 1981, is still in force. Besides, the complainant objects to it for the first time before the Tribunal so that his plea is irreceivable because he has failed to exhaust the internal means of redress. In any event the President of the Office exercises discretion in the matter of promotion: though there is a range of 19 to 23 years' experience required for A staff with a "good" rating, they have no right to promotion just because they reach 19 years.

D. In his rejoinder the complainant enlarges on his submissions that his experience has been counted short and that he was discriminated against. He presses his claims.

E. In its surrejoinder the EPO develops its arguments on receivability and on the merits. It observes that the plea of breach of equality was not put forward in the internal appeal and is irreceivable. Besides, it is devoid of merit because at 1 September 1986 the complainant's experience came to only 16 years and 9 months, less the one year and 4 months' experience he gained before the age of 25.

#### CONSIDERATIONS:

1. The issue in Mr. West's ninth complaint is whether he should have been promoted from grade A3 to A4 as from 1 September 1986. His case is that he should because the reckoning of his seniority for promotion should have been 17 years and 4 months as at 1 January 1985, so that by 1 September 1986, one year and 8 months later, it should have come to 19 years, a period sufficient for promotion to A4. The grounds for his claim are summed up in B above.

The EPO rejects the claim on the grounds that as at 1 September 1986 his seniority was only 15 years and 5 months, a period that was insufficient for promotion to A4.

2. The claim that his seniority for promotion should have been 17 years and 4 months as at 1 January 1985 is identical to the one he made in his eighth complaint and was dismissed in Judgment 847 of 10 December 1987, which is final.

3. The EPO decided that his experience came to less because of the rule that precludes the reckoning of experience gained before the age of 25. The complainant argues that the 25-year rule has been replaced by new guidelines.

The rule came into force in 1981, has not been replaced and is still in force. It is true that by Communiqué No. 4 of 3 July 1985 the President of the Office informed the staff that the "Presidential Committee" had agreed to a proposal to repeal the rule. But until a decision has been taken by the competent authority the 25-year rule remains in force. The President has made no such decision.

4. Besides, an official has no right to promotion simply because he has the minimum seniority required for it. Seniority is not the only criterion for promotion and the President has discretion in the matter.

5. Lastly, the complainant alleges breach of equality of treatment on the grounds that two other examiners promoted to A4 in 1986 had no higher rating than he and only 19 years' seniority.

The plea fails because the complainant was not in the same factual position as they: as is said in 2 above, the Tribunal rejected in Judgment 847 his contention that his seniority for promotion came to 19 years at 1 September 1986.

6. Since the complainant's claim to promotion fails, so does his claim to costs.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Mr. Edilbert Razafindralambo, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 30 June 1988.

Jacques Ducoux  
Mohamed Suffian  
E. Razafindralambo  
A.B. Gardner

