

SIXTY-NINTH SESSION

***In re* ROUBERT**

Judgment 1029

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. François Roubert against the European Patent Organisation (EPO) on 16 June 1989 and corrected on 18 July;

Considering the order made by the President of the Tribunal on 29 July 1989 and granting the EPO's application for suspension of the proceedings;

Considering the supplementary observations filed by the complainant on 24 October 1989;

Considering the EPO's reply of 15 December 1989 to the complaint as supplemented, the complainant's rejoinder of 12 February 1990 and the EPO's surrejoinder of 20 April 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 49(10) and 107(1) 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. The complainant, a Frenchman born in 1942, joined the staff of the former International Patent Institute in 1969 as an examiner of patents. On the merger of the Institute with the EPO in 1978 he became a permanent employee of the EPO as a grade A3 examiner at General Directorate 1 at The Hague. He was transferred to General Directorate 2 in Munich in April 1983. His total experience as reckoned for the purpose of promotion totalled 19 years by 1 March 1987 and from 1974 his performance was rated 3 ("good"). On 26 May 1987 his staff report for 1986 again gave him a general rating of "3+".

On 12 June 1987 the President of the European Patent Office sent a note to the chairman of the board that was to make recommendations for the promotion of examiners to grade A4 in 1987. In accordance with Article 49(10) of the Service Regulations the President gave the board the names of the permanent employees he considered to be qualified for promotion to A4. He explained that in particular examiners whose performance had been rated 3 must normally have from 19 to 23 years' total experience as reckoned for the purpose of promotion and that their minimum age must be "within the range" of 44 to 48 years.

The promotion board made its recommendations and the list of promotions to A4 in 1987 was made known on 29 July of that year. Finding that he was not on it, the complainant lodged on 28 October an internal appeal under Article 107(1) of the Service Regulations. The Principal Director of Personnel informed him by a letter of 3 December that the President had provisionally rejected it and referred it to the Appeals Committee.

The complainant was promoted to A4 as from 1 March 1988.

In its report of 22 December 1988 the Appeals Committee recommended sending his case back to the board, but on 9 March 1989 the President wrote him a letter refusing to do so. He got that decision on 21 March, and it is the one he impugns.

On 24 April he wrote to the President objecting and on 20 June the Principal Director of Personnel answered that the President would after all put the case again to the board.

On 29 July the President of the Tribunal suspended the proceedings so that the President of the Office might take his final decision after review by the board.

On 28 September the board reported that there were "no new elements of sufficient weight for it to change its earlier conclusion", and on the same day the President informed the complainant that he upheld his decision.

B. The complainant observes that the board recommended three groups for promotion: candidates over the age of 50, special cases and four officials in order of merit. The only group he might have been in was the last. In Judgment 880, which it published on 30 June 1988, the Tribunal held that a rating like "3+" was not admissible, and in a minute of 24 November 1988 the complainant's supervisor said in answer to inquiry from the Appeals Committee that in the light of the judgment he should have rated the complainant "very good" for 1986. Had the "3+" he actually got been replaced with 2 ("very good") he would have come higher in the order of merit and so got promotion. He should not suffer for the improper rating, especially since the EPO had been using it for years and he had no reason to challenge it at the time.

Had he stayed at The Hague he would have risen to A4 by 1987. Since he does different work at Munich and so had to learn new skills he could not attain a rating of 2 for some years. The decision offends against the principle of equal treatment and the Agreement on the integration of the Institute into the EPO. His transfer to Munich, which was in the EPO's interests, has caused him delay in promotion over and above financial and other injury. The delay has caused him moral prejudice too.

He seeks the quashing of the impugned decision and an award of costs.

In supplementary comments on the confirmatory decision of 28 September 1989 he maintains that the board wrongly assessed his merits and he presses his claims.

C. The EPO replies that the decision not to promote the complainant in 1987 shows no fatal flaw. Just to qualify he had to have "good" ratings and from 19 to 23 years' reckonable service and be between 44 and 48 years old. Those ranges show that merely qualifying for promotion confers no right to it and the President still exercises discretion by taking account not only of ratings but also of supervisors' comments and especially output because of the EPO's growing workload.

Though the complainant did meet the criteria the question is whether he should have come higher in the list of merit than the four successful candidates. The fourth one was older and so had priority over him anyway and he had no stronger claim than the third one. In the minute of 24 November 1988 his supervisor changed the general rating "because of the enlargement of the rating quotas". But that implies that according to the quotas in force in 1986 there had been no reason to change it. Besides, his "productivity" was rated only 3 and his supervisors had expressed reservations about it. So long as such an important factor was rated no more highly his general rating could not be 2, whatever his other merits.

Assessment of output takes due account of the examiner's own circumstances, such as the complexity of the field he is working in and his experience. For the complainant to say he would have reached A4 sooner at The Hague is mere speculation.

His charges of discrimination and breach of the integration agreement are unfounded. The Tribunal has

already declared lawful the arrangements for the transfer of Institute staff and it was because they favoured him that he had to wait for some time at the last step of A3 before qualifying for A4.

D. In his rejoinder the complainant enlarges on his pleas, maintaining that the promotion board should have given him preference. The countersigning officer actually recommended him for promotion to A4 in the report for 1986 on the strength of his general rating of "3+", and he contends that because of the rigidity of the rating quotas until 1988 not enough allowance was made for the difficulty of his work. Since high output can be achieved only after five years' work at Munich it was unfair of the board to take his ratings for output in 1984-86, when he was still learning. It was also unfair to disregard the quality of his performance at The Hague and so to make his transfer to Munich a handicap. Since he would have risen faster at The Hague he has been discriminated against. As for the meaning of "3+", his supervisor told the Committee that it meant "very good", and the EPO may not evade the consequences of its own improper rating by pleading otherwise.

E. In its surrejoinder the Organisation submits that the complainant's rejoinder does not weaken the case made out in its reply, on which it enlarges. The promotion board was not bound by the Appeals Committee's recommendation but free to make whatever recommendation it thought fit in the light of the further evidence before it: it alone could compare the complainant with the other candidates. Whatever "3+" may have meant, the rating for output, which was no higher than "3", held good and his claim to promotion was the weaker on that account: he did not deserve a general rating of "2" unless both quality and productivity were well above par. Comparison of the complainant with the other candidates shows nothing arbitrary or discriminatory about the President's decision. As for his contention that he needed time to adapt to his new duties on transfer to Munich, staff reports make allowance for changes of that kind. The standards of comparison applied by the promotion boards are fair.

CONSIDERATIONS:

1. The complainant, an examiner at the European Patent Office who held grade A3 when the dispute arose, seeks the quashing of a decision by the President of the Office to reject his claim to promotion to A4 in 1987.
2. He has been at loggerheads with the EPO over his promotion for some years. Not finding his name on the list of promotions for 1987, he lodged an internal appeal on 28 October of that year. In its reply the EPO said it had given due thought to his staff reports before taking its decision; though the general rating of his performance had been consistently 3 ("good") over the years and reached "3+" in 1986, his "productivity" had been below par and only very recently had earned a rating of 3; because of its heavy and growing workload the Organisation needed, more than ever, a high output from its examiners; that was why it had postponed promoting the complainant until his higher output became consistent.
3. Shortly after filing its reply with the Appeals Committee the EPO promoted the complainant to A4 at 1 March 1988 as a principal examiner. So the substance of his complaint comes down to the date of his promotion, which he wants to have backdated to 1987.
4. In his submissions to the Appeals Committee he argued that his career had suffered for his having agreed to move from General Directorate 1, at The Hague, where he was a search examiner, to General Directorate 2, in Munich, where he is a substantive examiner: since the duties of the two sorts of examiner differ widely he needed a long time to adjust. He also pointed out that the Principal Director of his Department recommended his promotion both in 1985 and in 1986, besides rating him "3+" in the staff report for 1986.
5. In its report of 22 December 1988 the Appeals Committee cited Judgment 880 (in re Benze), which the Tribunal issued on 30 June 1988 and in which it came out against marks in between those provided for in the rules on reporting. The Committee had asked the reporting officer to say what he had meant by "3+" in the report for 1986, and his answer was that in the light of the Tribunal's ruling it should be taken to mean 2 ("very good").
6. The Appeals Committee accordingly recommended sending the matter back to the promotion board for 1987 and reconsidering the date of the complainant's promotion in the light of the board's recommendation.
7. On getting the Committee's report the President first told him, in a letter of 9 March 1989, that there was no reason to go back on the appraisals made of his performance at the time, the less so since he had never challenged them. The President therefore rejected his appeal, and that is the decision he is now impugning.
8. In a letter of 24 April 1989 he cited Judgment 880 and the correction of his general rating by the reporting officer and he asked the President to think again. In a letter of 20 August the President said that, though he did not hold with the ex post facto change of rating, he would treat the case as out of the ordinary, reconsider the matter and again consult the promotion board.
9. On 28 September 1989 the board reported to the President that it had viewed the matter against all the material facts but found nothing to make it alter what it had said in reporting to the President in 1987; there were indeed no "new elements of sufficient weight to change its earlier conclusion", which had been in keeping with its general approach.
10. On the same day the President informed the complainant that in view of the promotion board's report he abided by his refusal of promotion in 1987.
11. The complainant's pleas are in substance the same as those he put to the Appeals Committee and rest on the

points it cited in support of its recommendation in his favour. He points out that the promotion board's unfavourable view is unsubstantiated. He asks the Tribunal to rescind the decision of 9 March 1989 and award him costs.

12. In its reply the EPO observes that since an earlier claim of his to "accelerated" advancement had been rejected on appeal and on the Appeals Committee's recommendation, he was subject to the so-called "normal" career pattern. The President made a proper exercise of his discretion in the matter in line with the general arrangements for normal career advancement and with the procedure provided for in Article 49 of the Service Regulations. In the EPO's submission he paid due regard to the ratings in the complainant's staff reports and chose to give special weight to output, an aspect of the complainant's work that at the time had not yet settled at the right level.

13. The complainant offers no evidence whatever to suggest that the President went beyond the bounds of his discretion as set in Article 49.

14. What that article says is that promotion shall be "by selection". That implies two things: that the President will look at the merits of each candidate for promotion, and that he will set all the candidates against each other and choose as many as the number of vacancies allows. For many years the general rating in the complainant's staff reports was "good". That shows that there was nothing outstanding about his work and that his future was very much a matter of discretion. The slight distinction in the rating in his staff report for 1986, whatever it really meant, did not restrict the President's discretion, and the promotion board's conclusion is plain enough: he still did not qualify by the criteria for promotion in 1987. Having got promotion in 1988 while this case was pending, he might have realised that he had no grounds for any greater expectations and that the time had come for him to withdraw suit.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, the Right Honourable Sir William Douglas, Deputy Judge, and Mr. Pierre Pescatore, Deputy Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

(Signed)

Jacques Ducoux
William Douglas
P. Pescatore

A.B. Gardner Registry's translation, the French text alone being authoritative.

In re ROUBERT

ORDER

The President of the Administrative Tribunal,

Considering the complaint filed by Mr. François Roubert on 16 June 1989 against the European Patent Organisation (EPO);

Considering the brief filed on 4 July 1989 by the Director of the Legal Service of the EPO applying for suspension of the proceedings;

Considering the complainant's observations of 19 July 1989 consenting to such suspension;

CONSIDERATIONS:

Since the parties are agreed on the suspension of the proceedings the Organisation's application is granted. The suspension should not, however, needlessly hold up the proceedings. If by 1 October 1989 the EPO has not completed its review of the case the complainant may at any time apply for resumption of the proceedings and the Registrar of the Tribunal shall then proceed at once without further order.

DECISION:

1. The application for suspension of the proceedings in Mr. Roubert's case is granted.
2. If by 1 October 1989 the Organisation has not completed its review of the case the Registrar of the Tribunal shall on the complainant's application at once proceed.

Paris, 29 July 1989.

(Signed)

Jacques Ducoux,

President.