

EIGHTY-NINTH SESSION

In re Concannon

Judgment No. 1968

The Administrative Tribunal,

Considering the complaint filed by Mr Brian Stephen Concannon against the European Patent Organisation (EPO) on 29 July 1999, the EPO's reply of 16 November 1999, including the observations made by Mr C. at the Tribunal's request, the complainant's rejoinder of 18 January 2000 and the Organisation's surrejoinder of 31 March 2000;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, 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, who is of British and Irish nationality and was born in 1955, joined the European Patent Office, the secretariat of the EPO, in 1989. He was assigned to the Office's Directorate-General 2 in Munich and classified as an examiner at grade A2 based on three years and seven months of relevant experience. He was promoted to grade A3 as of 1 November 1993, when he had obtained eight years experience.

Promotion in the EPO is governed by Article 49 of the Service Regulations for Permanent Employees of the European Patent Office as well as periodic instructions issued by the President of the Office to the chairmen of the promotion boards. The pertinent instructions for promotion from A3 to A4 at the material time set the following criteria for those eligible to be considered for the earliest promotion: an "outstanding" record of performance during three normal reporting periods, between 12-15 years of reckonable experience and a minimum age of between 37-40.

The EPO's Gazette 22/97 of 8 December 1997 announced, among others, the promotion of Mr C., the President's personal assistant, from grade A3 to A4. Although at the time he was promoted Mr C. had consistent "outstanding" performance appraisals, these covered a shorter time period than the requisite "3 normal reporting periods". In addition, he had only nine years of reckonable experience and was 34 years old. The Promotion Board did not include him on the list it had sent to the President. He was, however, carrying out the duties of an A5 post while at grade A3. On 23 February 1998, the complainant lodged an internal appeal against the President's decision to promote Mr C. On 6 March nearly 200 of his colleagues lodged similar appeals.

Having received no information on the status of his appeal for more than one year, the complainant wrote to the Chairman of the Appeals Committee on 8 March 1999 to inquire when either a hearing or a recommendation could be expected. The Chairman replied on 9 March that the Appeals Committee was waiting for the position paper of the Administration before it could hear the appeal and that he had forwarded the complainant's letter to the Administration for further action. On 19 March the Director of Personnel Development wrote to the complainant that, owing to a backlog of appeals, he was unable to predict when the Administration's position paper would be ready.

When no further action seemed forthcoming, the complainant filed his complaint with the Tribunal on 29 July 1999.

B. The complainant argues that he is justified in filing his complaint with the Tribunal based on the length of the delay in handling his appeal along with the fact that the Administration was unable to tell him when it might submit its position paper.

On the merits he pleads a procedural flaw. The decision to promote Mr C., in his view, was taken in breach of Article 49 of the Service Regulations and the President's instructions on promotion. He contends that this adversely

affects him. By promoting a permanent employee who does not meet the minimum criteria, all other permanent employees are harmed because it is a decision "based on unknown criteria different from those applicable to the complainant and the rest of the defendant's staff". The President has breached the principle of equal treatment by not abiding by the criteria for promotion that he has set for the rest of the staff. The promotion also breaches the principle of objectivity which can only be maintained if the proper procedure is respected. In this case it means that the "Promotion Board shall draw up and forward to the President a list presented in order of merit of employees who are eligible for promotion based on a comparison of their merits together with a reasoned report".

The complainant requests that the decision to promote Mr C. to grade A4 as of 1 December 1997 be set aside or that the EPO be ordered to pay him 3,500 German marks (or the euro equivalent) in moral damages. He also requests 2,500 marks (or the euro equivalent) in costs.

C. In its reply the EPO objects to the receivability of the complaint because the complainant has failed to exhaust all internal means of redress. Although there has been a delay in dealing with the appeal, the complainant has not shown "that the internal appeal proceedings are unlikely to end within a reasonable time" as required by the Tribunal in Judgment 1829 (*in re Müller-Engelmann*). It also contends that the complaint is irreceivable because the complainant cannot show that he was adversely affected by the decision to promote Mr C., particularly given the fact that the complainant did not satisfy the objective criteria for promotion in 1997.

Subsidiarily on the merits, the Organisation denies that the decision to promote Mr C. was procedurally flawed. His name was put forward to the Promotion Board for exceptional consideration by the President, his immediate supervisor, on the basis that he had the nine years of professional experience required by an A4 job description. The Board subsequently "limited its recommendations to those cases which met the 'usual' requirements, and abstained from making any recommendations on the 'special' cases". In Mr C.'s case it simply stated that it was "not in a position to recommend a promotion", and this does not constitute a procedural flaw. Nor was the principle of equal treatment breached as the complainant and Mr C. were not in the same position in law.

D. In his rejoinder the complainant contends that the President's decision to promote Mr C. despite the fact that the Promotion Board did not recommend him for promotion shows an abuse of power. He reiterates that the promotion procedure was flawed, placing particular emphasis on "the out-of-sequence staff report" written by the President just days before he submitted Mr C.'s name to the Promotion Board.

E. In its surrejoinder the Organisation attaches the Appeals Committee's report of 31 January 2000. In this report the Committee unanimously finds in favour of allowing the appeal but the EPO emphasises that the Committee had concluded, contrary to the complainant's arguments, that there was no error in relying on the out-of-sequence staff report. It presses its arguments that the promotion of Mr C. was not tainted by abuse of power or a procedural flaw.

CONSIDERATIONS

1. The complainant appeals against the administrative decision of the President of his employer, the European Patent Office, promoting the complainant's colleague Mr C. to grade A4 with effect from 1 December 1997. Prior to that promotion, Mr C., like the complainant, was at grade A3. In February and March 1998, the complainant and some two hundred of his colleagues filed internal appeals with the President in a timely manner. The appeals were referred by the President to the Appeals Committee in April 1998.

2. In March 1999, the complainant inquired of the Chairman of the Appeals Committee as to when the Committee might be prepared to make its recommendations. He received a reply to the effect that the Committee had not yet received the position paper of the Administration and the complete file. On 19 March 1999 the Director of Personnel Development wrote to the complainant stating that there was a serious backlog in the processing of internal appeals but that his service would endeavour to produce the Administration's position paper as soon as possible. The present complaint was filed on 29 July 1999; the relief sought is either the setting aside of the decision to promote Mr C. or moral damages.

Receivability

3. The defendant claims that the complaint is irreceivable on two grounds: first that the complainant has not exhausted his internal means of redress and second that the decision to promote a colleague does not adversely affect the complainant.

4. The Tribunal holds the complaint to be receivable. The circumstances of the present case are such that it would be unreasonable to expect the complainant to have waited any longer for the Administration to get around to dealing with his internal appeal. In Judgment 1829 the Tribunal recently summarised the state of its case law as follows:

"6. ... The Tribunal's case law has it that where the pursuit of the internal remedies is unreasonably delayed the requirement of Article VII(1) will have been met if, though doing everything that can be expected to get the matter concluded, the complainant can show that the internal appeal proceedings are unlikely to end within a reasonable time: see Judgments 1243 (*in re* Birendar Singh No. 2) under 16, 1404 (*in re* Rwegellera) under 8, 1433 (*in re* McLean) under 4 and 6, 1486 (*in re* Wassef No. 8) under 11 and 13, 1534 (*in re* Wassef No. 14) under 3 and 1684 (*in re* Forté) under 3.

7. The complainant's internal appeal was received by the Organisation on 16 April 1997. Her statement is lengthy and has 24 annexes. Less than a month later the Vice-President completed his initial assessment of her claims and referred the matter to the Appeals Committee. She filed this complaint just over three months later.

8. The Tribunal holds that at the date of filing the present complaint the internal appeal process had not been unreasonably delayed and there was no indication that it was unlikely to come to an end within a reasonable time. That part too of the complaint is therefore irreceivable."

5. The Organisation argues that since in fact the complete file and the Administration's position paper were sent to the Appeals Committee on 12 October 1999, it is now established that the internal appeal is going forward and that the complainant has not accordingly exhausted his internal means of redress. The Tribunal disagrees. Receivability falls to be determined at the time that a complaint is filed, not at some later date. As at 29 July 1999 the complainant had done all that could be reasonably expected of him. He had filed his appeal in time. Approximately a year later he wrote to enquire about its progress and had been informed that the Administration had done nothing but would move forward as soon as possible. He filed his complaint just over four months later having heard nothing further from the Administration. At that time almost twenty months had elapsed since the original challenged decision had been published. The Administration's plea that it had a heavy backlog of internal appeals to deal with may be a reason for the inordinate delay, but it is not an excuse. As at 29 July 1999, it was simply not reasonable to expect the complainant to wait any longer to see even the beginning of the end of the internal appeal procedure. If the Organisation was overloaded with internal appeals, it was for it to remedy the situation rather than expect the complainant to bear the consequences.

6. The second ground of alleged irreceivability is equally untenable. As will appear below, the gravamen of the complaint is that Mr C. did not meet the published criteria for promotion from A3 to A4. To this the Administration pleads that it was entitled to treat Mr C. as an exceptional case. If that is so, then it is nothing to the point that the complainant also does not meet all the criteria for promotion from A3 to A4 since he too can claim that he has a right to be considered as an exceptional case and was therefore adversely affected by the impugned decision. Both were at the same grade, in the same career stream, and both are entitled to expect that promotions will only be made fairly and objectively, based on merit and in accordance with law.

Merits

7. Promotion for staff members of the EPO is governed by Article 49 of the Service Regulations, the relevant portions being paragraphs 4, 7 and 10 which read as follows:

"(4) Where the appointing authority is the President of the Office he shall take his decision after consulting a Promotion Board."

"(7) Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. The employees must have the minimum number of years of professional experience required under the job description in order to obtain the grade for the post concerned and at least two years service in their grade in the Office."

"(10) The President of the Office shall forward to the Promotion Board the names of all permanent employees who possess the necessary qualifications referred to in paragraphs 7 and 9 above.

The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and

may, if it so decides, interview any permanent employee under consideration.

The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

8. Pursuant to this Article, the President sent instructions to the Promotion Board together with relevant information relating to all the staff members who might be eligible for promotion. The instructions issued in December 1996 contained the following paragraphs with regard to the general criteria normally applicable to promotion from A3 to A4:

"III. Promotions from A3 to A4

Individuals may be considered as eligible for promotion who meet the following criteria:

- Individuals with an 'outstanding' record of performance between 12 and 15 years', those with a 'very good' record of performance between 15 and 18 years' and those with an unqualified 'good' record of performance with 19-23 years' reckonable experience. Entry into each of these ranges of experience will also normally depend on the attainment of certain minimum ages of between 37-40 for those considered 'excellent', 40-44 for the 'very goods' and 44-48 for the 'goods'.

- Candidates who have reached the age of 50 and who have at least 3 years' service with the EPO may be considered eligible for promotion if this is also supported by the individual's merit."

- The Promotion Board may, if appropriate, draw my attention to special cases, even where the usual requirements are not fully met. "

9. Both the complainant's name and that of Mr C. appeared on the lists of eligible A3 employees which were attached to these instructions. However, neither met the "normal" or "usual" requirements established by the President's instructions to the Promotion Board quoted above.

10. In particular it is common ground that Mr C. did not meet either the requirements for age or years of reckonable service, set out in these instructions, for the promotion that he received.

11. It is equally clear, however, that the Organisation is right when it pleads as it does that an earlier decision of the Administrative Council together with both the text of Article 49 and the President's instructions to the Promotion Board, make it plain that, in exceptional circumstances some persons may be promoted who do not meet the normal criteria established. It is for this reason that the instructions themselves invite the Promotion Board to submit any such "special cases" to the President for his consideration.

12. Mr C.'s posting was to a position where he was required to work in close personal proximity to the President in the latter's office and under his direct supervision. At the relevant time, he had nine years of reckonable experience with the Organisation. He was clearly an outstanding employee and all his staff reports had been highly laudatory. There can be no doubt that the President had formed the view, prior to any consultation process involving the Promotion Board, that Mr C. should be promoted to grade A4. He wrote on 11 April 1997 to the Promotion Board drawing the Board's attention to Mr C.'s case and suggesting that he be treated as a "special case".

13. The Board declined to recommend the promotion of Mr C. stating that it was not in a position to do so. Notwithstanding, the President made the promotion on his own authority.

14. The complainant argues that the decision to promote Mr C. was procedurally flawed and did not meet the requirements of objectivity and fairness which are an integral part of the merit principle in international civil service law.

15. The Tribunal agrees. While it is clear that the role of the Promotion Board is essentially consultative and that the Organisation is not obliged to make promotions in accordance with its recommendations, it is equally clear that the Organisation has formally committed itself only to making promotions which have been approved and recommended by the Board. The third paragraph of Article 49(10), quoted above, clearly qualifies the discretion given to the President by Article 49(4) when it states that the Board shall draw up and send to the President "for his

decision" a list of eligible candidates. If there were any doubt on the subject, it would be resolved by the following passage which appears in the President's instructions to the Board:

"I invite you to present your recommendations in lists, established in order of merit within each grade. The lists must be accompanied by a reasoned report. I will then decide on the individual promotions by making a selection from the candidates you suggest ..." (emphasis added)

16. In Judgment 1600 (*in re* Blimetsrieder and others), a case whose facts are very similar to the present one, the Tribunal said:

"Article 49 of the Service Regulations and the guidelines laid down by the President for the Promotion Board establish a promotion procedure of which the fairness and impartiality are ensured as far as possible by the presence of staff representatives on the Board. If the Board is denied information it seeks or if a decision to promote is taken against the Board's advice and on the basis of considerations other than ability and the record of performance, as prescribed in Article 49(7) of the Service Regulations, then fairness and impartiality can no longer be ensured."

17. In the present case, the President sought, but failed to obtain, the Promotion Board's approval for his proposal to promote Mr C. While the President clearly has a residual discretion not to make promotions which the Board recommends, he may only make promotions in accordance with the Board's recommendations. Since the Board declined to recommend Mr C. for promotion, his promotion was irregular.

18. Furthermore, as the appointing authority, it was clearly inappropriate for the President, having urged the Promotion Board to treat Mr C. as a special case, to then disregard the Board's refusal to recommend the promotion. The decision cannot stand.

19. The complainant is entitled to his costs which the Tribunal assesses in the amount of 1,000 euros.

DECISION

For the above reasons,

1. The impugned decision is set aside.
2. The complainant is entitled to 1,000 euros in costs.
3. His other claims are dismissed.

In witness of this judgment, adopted on 10 May 2000, Mr Michel Gentot, President of the Tribunal, Miss Mella Carroll, Vice-President, and Mr James K. Hugessen, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 12 July 2000.

Michel Gentot

Mella Carroll

James K. Hugessen

Catherine Comtet