

THIRTY-FIFTH ORDINARY SESSION

***In re* ANDARY**

Judgment No. 263

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint against the International Patent Institute drawn up by Mr. Raymond Andary on 30 December 1974 and brought into conformity with the Rules of Court on 5 February 1975, the Institute's reply of 28 February 1975 and the complainant's rejoinder of 18 March 1975;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal, Articles 10, 25, 26, 27, 82, 83, 89 and 90 of the Institute Staff Regulations and Institute staff circular of 14 November 1974;

Having examined the documents in the dossier, oral proceedings having been neither requested nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant joined the service of the Institute on 1 January 1971 and on 1 January 1974 he met the condition of two years' minimum seniority at grade A7 required as qualification for promotion to grade A6. His file was therefore submitted to the Careers Committee, which was to determine the list of promotions to grade A6 for 1974. The Careers Committee made a unanimous recommendation on 20 September 1974 that several officials should be promoted in accordance with criteria specified in the text of that recommendation. It recommended promoting the complainant with effect from 1 January 1974 on the grounds that he met the conditions which formed part of one of those criteria.

B. The Chief of Personnel, the Secretary of the Committee, forwarded the Committee's recommendation to the Director-General by minute of 23 September 1974. By letter of 30 September 1974 the complainant offered the Director-General his resignation. By decision of 9 October 1974 the Director-General accepted it with effect from 31 December. A circular addressed to all Institute officials on 14 November 1974 gave the list of promoted officials and the criteria on which the promotions had been based. The publication by the Director-General of the criteria on which he had based his decision showed that for the promotions from grade A7 to A6 he had adopted the criteria proposed by the Careers Committee, including the one on which the Committee had based a recommendation for promoting the complainant. The circular added a final "remark", however - which had not formed part of the Committee's recommendation - to the effect that "Officials who have resigned or been granted leave for reasons of personal convenience are not considered for promotion". For that reason the complainant was not included in the list of promoted officials.

C. On 26 November 1974 the complainant wrote to the Director-General asking for promotion to grade A6. The Director-General refused on 4 February 1975. In the meantime, on the grounds that the Administration had failed to reply the complainant lodged a complaint with the Tribunal in accordance with Article VII of its Statute.

D. The complainant contends that the list of promotions recommended by the Careers Committee shows that the criteria and conditions adopted by the Committee related exclusively to merit. The "remark" in the staff circular of 14 November 1974 constituted a new criterion introduced without consulting or obtaining the consent of that Committee, the Personnel Committee or the Advisory Administrative Committee. Neither the Staff Regulations nor any subsidiary rules contain any provision which precludes consideration for promotion of staff members who have resigned. Such a unilateral ruling constitutes an addition and an amendment to the Staff Regulations and is an abuse of authority and an infringement of the compulsory procedures for consultation laid down in the Staff Regulations.

E. In his claims for relief the complainant asks the Tribunal to quash the Director-General's implicit decision, which became final on 26 January 1975, not to promote him from grade A7 to grade A6 and, inasmuch as it is no

longer possible to order performance of the Director-General's obligation, to award the complainant approximately 3,000 guilders representing the additional salary to which he would have been entitled in 1974 had the Director-General performed his obligation, costs estimated at 3,000 Swiss francs, and interest on such overdue sums at 8 per cent a year from the date of the judgment.

F. The Institute maintains that in not including the complainant in the list of promoted officials the Director-General merely exercised the discretionary authority conferred on him under the Staff Regulations with regard to promotions. A promotion is an exercise of choice by the Director-General and, although he makes the choice after consulting the Careers Committee, in the last resort it is he and he alone who takes the decision and he is in no way bound by the Committee's recommendations. In other words the official has no right to promotion. The special situation of the complainant, who offered his resignation and had it accepted, is a fact which the Director-General was entitled to take into account in deciding not to promote him. The reason for that decision cannot have the effect of tainting it with any of the flaws which entitle the Tribunal to interfere. On the contrary, the choice of that reason falls within the scope of the discretionary authority with which in the organisation's interests the Director-General is endowed.

G. The Institute contends that the contested "remark" does not in any way have the force of a ruling. Its purpose is to explain a consideration which led the Director-General to decide against promoting certain officials. It thus provides merely the reason for the decision taken with regard to the complainant and other officials who had resigned or obtained leave for reasons of personal convenience. That reason was not separable from the decision itself and there was therefore no call to make it the subject of consultation. All that is required is for the decision to be taken after consultation of the Careers Committee, as indeed it was. Just as the Director-General may disregard the Committee's recommendation he may clearly also give a reason for his decision without having to consult the Committee again.

H. The Institute accordingly asks the Tribunal to declare the complaint receivable, but to dismiss it as unfounded and therefore to dismiss the complainant's claim for payment of about 3,000 guilders representing the additional salary which he would have received had he been promoted and his claim for payment of costs amounting to 3,000 Swiss francs.

CONSIDERATIONS:

As to the receivability of the complaint:

1. Article VII, paragraph 3, of the Statute of the Tribunal prescribes the possibility of appealing to the Tribunal where the Administration fails to take a decision upon a claim within sixty days from the notification of that claim. Article 83(5) of the Staff Regulations of the Institute lays down the same rule in a different form. It provides that if a claim addressed to the Director-General or the Administrative Council has not been decided upon within sixty days of the date of its notification or submission it is deemed to be dismissed.

In the present case the complainant asked the Director-General on 26 November 1974 for a decision regarding his promotion from grade A7 to grade A6. The Director-General did not answer that letter within the prescribed time limit. Hence on 31 January 1975, i.e. after the expiry of that time limit, the complainant's agent validly filed the present complaint. Besides, on 4 February 1975 the Director-General expressly dismissed the complainant's claim.

As to the Tribunal's power of review:

2. Article 25(1) of the Staff Regulations provides (Registry translation): "Promotion is granted by decision of the Director-General. The official who is promoted is appointed to the next highest grade in the category to which he belongs. Promotion is made exclusively by selection from among officials who have a minimum seniority in their grade after comparative appraisal of the merits of those qualified for promotion and of their performance reports." It appears from this provision, and in particular from the word "selection", that as a rule the decision whether or not to promote an official falls within the discretionary authority of the Director-General and is therefore subject to only limited review by the Tribunal. In general the Tribunal will not interfere with the decision unless 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 it is tainted with abuse of authority, or if a clearly mistaken conclusion has been drawn from the facts.

There does remain the possibility, however, that, instead of granting promotion on the merits of each case, the Director-General should before taking his decisions lay down rules or criteria for promotion which he notifies to the staff. In that case a distinction should be drawn. First, in formulating the rules themselves the Director-General exercises real discretionary authority. Accordingly, when the Tribunal has to determine the validity of such rules its power of review takes the limited form described above. But secondly, the Director-General is then bound to observe those rules, which have legal force. Accordingly the Tribunal will regard any infringement of those rules as a flaw which warrants quashing the impugned decision.

In the present case, with a view to making the promotions for 1974 the Careers Committee formulated criteria which the Director-General adopted in their entirety and... notified to the staff. As both parties admit, the complainant met the conditions set in section 2.I.a for promotion from grade A7 to grade A6. since he had resigned on 30 September 1974, however, he was denied such promotion by virtue of the following rule which the Careers Committee had not proposed, but which the Director-General on his own initiative formulated at the end of the staff circular (Registry translation): "Important remark applying to all promotions: officials who have resigned or been granted leave for reasons of personal convenience are not considered for promotion". The Tribunal therefore has to determine solely whether that rule is valid; in other words, it has to decide a matter within the scope of limited review.

As to the decision not to promote officials who had resigned:

3. Contrary to the complainant's contention, a decision not to promote officials who have resigned is not tainted with any flaw which entitles the Tribunal to interfere.

First, the complainant cannot properly criticise the Director-General for departing from the Careers Committee's recommendations by adding to the criteria which it had laid down, and which he had himself adopted, a rule excluding from promotion officials who had resigned. It is true that according to Article 26 of the Staff Regulations the Director-General's decisions on promotions, except for promotions to grades above A3, are based on the substantiated recommendation of a careers committee. But no provision confers any mandatory character on the recommendations of that body. Consequently, just as the Director-General may alter the criteria proposed to him by that committee, so he is entitled to limit the application of those criteria and in particular to deprive any particular category of officials of their benefits. To allege that the Director-General is bound by some sort of quasi-contractual agreement to accept the Careers Committee's recommendations is to misunderstand the nature of the relationship between the Institute's supreme executive body and what is a purely advisory body..

Nor did the Director-General infringe Articles 89 and 90 of the Staff Regulations in failing to consult the bodies mentioned in those articles, namely the Personnel Committee and the Advisory Administrative Committee. It is true that according to Article 89(4) of the Staff Regulations the Personnel Committee should be consulted in particular on conditions of work and life of officials. It is also true that according to Article 90(1)(b) the Director-General puts before the Administrative Committee, except in case of urgency, draft provisions of concern to the whole or to part of the staff. It appears, however, from the presentation of the Staff Regulations that Article 26 is of a special nature different from that of Articles 89 and 90: in the area in which the Careers Committee is competent, namely promotions, the Personnel Committee and the Advisory Administrative Committee do not have to be consulted.

Lastly, in refusing to promote officials who had resigned the Director-General did not draw any clearly mistaken conclusion from the situation of such officials. Promotion from one grade to another may have two consequences: either the promoted official is given, in addition to a salary increase, new duties which generally entail greater responsibilities, or else he simply obtains an increase in salary without any change in duties. In the former case promotion would serve no purpose: the official who had resigned would remain for too short a time in the higher grade to which he had been promoted to perform the duties of the new post. In the latter case the decision not to promote the official is also warranted: if promotion consists merely in an increase in salary its purpose is not merely to reward the official for past and present performance but also generally to encourage him to remain for a long period in the service of his employer.

DECISION:

For the above reasons,

The complaint is 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 27 October 1975.

(Signed)

M. Letourneur
André Grisel
Devlin

Roland Morellet