

SIXTY-FIFTH SESSION

***In re* HAKIN (No. 10)**

Judgment 940

THE ADMINISTRATIVE TRIBUNAL,

Considering the tenth complaint filed by Mr. Robert Hakin against the European Patent Organisation (EPO) on 8 June 1988, the EPO's reply of 8 August, the complainant's rejoinder of 15 September and the EPO's surrejoinder of 14 October 1988;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

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. This case is the sequel to several disputes about the complainant's staff reports for 1979 and 1980-81 and his consequent promotion to grade A4. Relevant facts appear in Judgments 724, 725, 806 and 820, under A.

The complainant was until retirement an examiner with the EPO in Munich. He was promoted to grade A4 on 21 February 1984 as from 1 January 1983. Ruling on his sixth complaint in Judgment 724 of 17 March 1986, the Tribunal refused to quash the decision to approve the complainant's staff report for the last four months of 1979 and held that his claim to retroactive promotion as from 1 January 1981 was premature. In Judgment 725, also of 17 March 1986, on his seventh complaint, the Tribunal dismissed as premature his appeal against the staff report signed on 8 December 1982 on his performance in 1980 and 1981. Ruling on his eighth complaint in Judgment 806 of 13 March 1987, the Tribunal rejected his claim to the quashing of that report.

On 15 April 1987 the Principal Director of Personnel told the complainant that the promotion board had reviewed his case in the light of Judgment 806 and, having received its report, the President of the Office was confirming at 1 January 1983 the date of his promotion to A4.

On 14 August 1986 the complainant had filed his ninth complaint challenging the decision to promote him as from that date. The Tribunal dismissed that complaint in Judgment 820 on 5 June 1987 on the grounds that he had failed to exhaust the internal means of redress.

By a letter of 4 June he filed an internal appeal against the decision of 15 April 1987. By a letter of 23 March 1988, the impugned decision, the Principal Director of Personnel informed him that on the recommendation of the majority of the Appeals Committee the President had dismissed his appeal.

B. The complainant's case is that his promotion should be backdated to 1 January 1981. The only staff report on him the promotion board had by that date was the one for 1979. An ad hoc report ought therefore to have been written early in 1981 and put to the board so that it could decide whether to recommend promoting him in that year. As the Appeals Committee unanimously held, the Administration had been remiss in failing to have such a report written. Since the Organisation failed to abide by its own rules on reporting and promotion the impugned decision is tainted with irregularities.

The complainant asks the Tribunal to award him moral damages; order the EPO to backdate his promotion to 1 January 1981 instead of 1 January 1983 and make up the difference in salary and allowances between grades A3 and A4 for the period from 1 January 1981 to 31 December 1982, plus interest; or, failing that, to order the Organisation to put his records again to the promotion board, "except for his complete staff report for 1980-81".

C. The EPO replies that it was right to have no ad hoc report on the complainant made for the promotion board in

1981. The complainant had challenged the general mark, which was "adequate", in his original report for 1979. But when the board met the conciliation proceedings were not over, the general mark therefore held good, and the complainant therefore failed to qualify for promotion to A4. There was therefore no point in ordering an ad hoc report.

Subsidiarily, the EPO argues that the absence of an ad hoc report would not have made any difference to the adverse recommendation by the promotion board since such a report would presumably have said much the same as the report for 1980-81; indeed any ad hoc report would have been bound to refer to the complainant's low output.

The Organisation therefore invites the Tribunal to dismiss the complaint as devoid of merit.

D. In his rejoinder the complainant seeks to refute the Organisation's pleas. He again maintains that it was wrong not to order an ad hoc report. He enlarges on his own arguments and presses his claims. He seeks disclosure of an adverse recommendation by the promotion board and contends that if there is no such text the impugned decision is tainted with a procedural flaw.

E. In its surrejoinder the Organisation submits that the rejoinder says nothing to weaken its case and it maintains the pleas in its reply. It discloses the text of the adverse recommendation which the promotion board made on 31 March 1987 after the Tribunal had delivered Judgment 806 and on which the President based his decision not to backdate the promotion to 1 January 1981.

CONSIDERATIONS:

1. On 21 February 1984 the complainant, who has since retired from the European Patent Office, was promoted to grade A4 as from 1 January 1983. He is asking the Tribunal to quash a decision by the President of the Office not to backdate his promotion to 1 January 1981.

2. The complainant has for years been at odds with the Organisation over his staff reports for 1979 and 1980-81. The Tribunal ruled on the disputes in Judgments 724 of 17 March 1986 and 820 of 5 June 1987, which are about his report for 1979, and in Judgments 725 of 17 March 1986 and 806 of 13 March 1987, which are about the one for 1980-81. Judgment 806 takes stock of the disputes. The effect of those rulings was to uphold the reports in substance, although in Judgment 724 the Tribunal awarded the complainant a large sum in damages for procedural flaws in the 1979 report.

3. Not until 21 February 1984, then, was the complainant promoted. His promotion had been precluded before because the relevant staff reports were under challenge, and after the Tribunal's rulings the President took it on himself to ask the promotion board whether the complainant might have qualified for promotion as from 1 January 1981. The board's answer being no, the President decided on 15 April 1987 to confirm the effective date.

4. That is the decision against which the complainant lodged an internal appeal on 4 June 1987. The Appeals Committee held that after the lapse of so much time and after so much litigation it would be difficult to "reconstruct an ad hoc report" on him for 1980-81 and that since his staff reports had not been very good the President had been right not to backdate his promotion before 1 January 1983. Two members of the Committee nevertheless wondered whether he would not have qualified for earlier promotion if instead of the challenged staff reports the board had had a fuller report before it at the time.

5. On 23 March 1988 the President decided to follow the majority recommendation and reject the appeal. The complainant thereupon filed this complaint with the Tribunal on 8 June 1988.

6. The complainant sets out in his original brief and in greater detail in his rejoinder the facts that prompted his earlier complaints and observes that at the time he was denied the opportunity of getting his promotion because no ad hoc report had been made for him, as he says has been made for other staff. He invites the Tribunal to order the EPO to backdate his promotion to 1 January 1981, make up his pay, with interest, and pay him moral damages.

7. The Organisation goes into the complainant's pleas in some detail, confirming its position and asking the Tribunal to dismiss the complaint.

8. Instead of taking up the complainant's grievances, which have already formed the subject of four complaints, the Tribunal need only make the following comments.

9. As the Appeals Committee said in its report, though there are rules, promotion is in essence at the President's discretion. The President will wisely exercise his right to promote if he favours those whose abilities and performance are well above average. As the Tribunal observed in Judgment 806, the complainant's work was poor. It is therefore reasonable to hold that he was adequately rewarded by promotion as from 1 January 1983 and that the President, who showed concern by consulting the promotion board, had no reason to alter that decision.

10. It appears from the foregoing that the complaint is devoid of merit.

DECISION:

For the above reasons,

The complaint is dismissed. In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Mr. Héctor Gros Espiell, 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 8 December 1988.

(Signed)

Jacques Ducoux
H. Gros Espiell
P. Pescatore
A.B. Gardner