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

SEVENTY-NINTH SESSION

In re WEBER

Judgment 1463

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Pascal Weber against the European Patent Organisation (EPO) on 20 May 1994, the EPO's reply of 26 August, the complainant's rejoinder of 6 September and the Organisation's surrejoinder of 17 November 1994;

Considering Article II, paragraph 5, 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, a Frenchman born in 1960, took up duty with the EPO at grade A1 on 1 January 1985 at Directorate-General 1 (DG1) of the European Patent Office, the secretariat of the EPO, at The Hague. On 1 April 1986 he was promoted to grade A2. He was transferred as a patent examiner to Directorate-General 2 (DG2) at Munich on 1 September 1988.

His performance in the period from 1 January 1988 to 31 December 1990 was rated 2 ("very good"). By 1 April 1991 he completed seven years' professional experience, the minimum necessary for promotion to grade A3. Before making a recommendation the Promotion Board wished as usual to be satisfied that he had been keeping up his performance. So it asked for an ad hoc report on his work from 1 January to 30 June 1991. He signed the report on 26 August 1991 and it gave him a 3 ("good"). He got another 3 in a second report for the first eleven months of 1991, which he signed on 5 December 1991 and which the representative of the President of the Office endorsed on 12 January 1992.

The Promotion Board did not recommend promoting him to A3 in 1991.

His promotion took effect only at 1 January 1992. But he believed that he qualified for promotion at 1 April 1991 and therefore asked for "review" of his case in a letter of 14 February 1992 to the chairman of the Appeals Committee. On 27 February he explained that his letter had really been intended for the chairman and members of the Promotion Board.

By a letter of 21 April the Principal Director of Personnel told him that the Promotion Board would not entertain an appeal from a staff member about promotion and that, though the President had asked the Board to reconsider, it still declined to recommend promoting him in 1991.

On 21 July 1992 he lodged an appeal with the Appeals Committee. He entered a brief on 26 August 1993. In its report of 7 January 1994 the Committee unanimously recommended rejecting his appeal. By a letter of 21 February - the decision he is challenging - the Director of Staff Policy informed him of the President's endorsement of that recommendation.

B. The complainant objects to the process of reporting on staff and of promotion at the EPO. He points out that the Promotion Board meets late in the year to look at the whole batch of applications for promotion from staff who qualify for it by seniority in the course of that year. And their performance is ordinarily expected to be as good at the date of promotion as it was on completion of the qualifying period. He has two pleas.

One is that there is breach of equal treatment. Someone who completes the seven years' experience at the start of the year fares less well than someone who does so at the end. For the latter to get promotion performance does not have to be rated "very good" for so long since the Promotion Board needs no ad hoc report to make a

recommendation. But the complainant's performance had to be rated "very good" also in the further period covered by the ad hoc report.

Secondly, the demand for an ad hoc report makes the whole process arbitrary. The quantity and quality of a patent examiner's work over a period will depend on such things as the difficulty of the files and the number of days off work. Someone may well qualify for promotion at one date but not at another, and it is the Promotion Board that determines at discretion the period to be covered by the report.

In any event the rating "good" he was given in the ad hoc report overlooked the exceptional circumstances which caused him to be off work for many days and so have a lower output in the first half of 1991. The decision not to promote him at 1 April 1991 was due to misappraisal of the facts.

Favourable comment by the countersigning officer in the second report for 1991 misled him; had it not been there he would no doubt have objected to the report.

He asks the Tribunal to quash the decision of 21 February 1994 and order his promotion to A3 at 1 April 1991.

C. In its reply the Organisation submits that the complainant may not properly challenge the system of reporting and of promotion unless it has caused him injury.

There are no ad hoc reports any more; it is nevertheless quite proper to check that someone who qualifies for promotion has kept up performance until the Promotion Board makes its recommendation. The ad hoc report was warranted in the complainant's case because he had not completed the seven years' professional experience until 1 April 1991, and his last report had been about 1990.

His second report for 1991, which the Promotion Board had when it reviewed his case, shows that the assessment of him in the ad hoc report was due, not to the choice of the period covered, but to a drop in his output.

The countersigning officer's comments are not binding on the Promotion Board. A line of precedent says that promotion is not a right. Besides, the complainant was promoted to A3 at 1 January 1992 although someone with a general rating of only 3 has to complete eight years' professional experience and he did not do so until 1 April 1992.

D. In his rejoinder the complainant presses his objections to the system of reporting and promotion. In his submission it is deceitful, unfair and in breach of its contractual obligations for the EPO to refuse promotion on the strength of a report covering some arbitrarily chosen period when performance has till then been up to scratch.

Over and above his earlier claims he seeks awards of 2,000 German marks in moral damages and of another 2,000 in costs.

E. In its surrejoinder the Organisation again points out that no-one has any right to promotion; so contractual obligations are irrelevant.

The President has discretion to take criteria other than the minimum requirements. That is why he chose to promote only those whose performance had kept up until the date of the Promotion Board's recommendation.

CONSIDERATIONS:

1. The EPO employs the complainant as a patent examiner. He held grade A2 from 1988. He found that he was not on the list of promotions of examiners to grade A3 in 1991. In the belief that he qualified for such promotion he wrote the chairman of the Promotion Board a letter on 14 February 1992 asking for review of his case. By a letter of 21 April 1992 the EPO told him that after carrying out such review on the instructions of the President of the Office the Board had upheld its recommendation against promoting him in 1991. He filed an internal appeal but on 7 January 1994 the Appeals Committee recommended rejecting it. The President's endorsement of that recommendation on 21 February 1994 is the decision impugned.

2. The original complaint claims the quashing of the impugned decision and promotion to grade A3 at 1 April 1991. The rejoinder makes further claims, to awards of 2,000 German marks in moral damages and of another 2,000 in costs.

3. According to consistent precedent promotion is at the appointing authority's discretion. That is the general rule, it applies even in the absence of written rules, and it is reflected in Article 49(7) of the EPO's Service Regulations, which says that promotions are "by selection" from among permanent employees with the proper qualifications. That entails assessment of each applicant on merit and comparison with the others. The Tribunal will exercise only a limited power of review over a decision on whether to grant promotion and will not interfere unless it finds one of the few fatal flaws that it listed, for example, in Judgment 1137 (in re West No. 11) under 2. The flaws are that the decision was taken ultra vires, shows some formal or procedural irregularity, overlooks a material fact, draws a wrong conclusion from the evidence, rests on an error of fact or of law, or amounts to abuse of authority. Those criteria hold good where, before taking decisions, the appointing authority lays down general rules and notifies them to the staff. The lawfulness of such rules is again subject to only limited review by the Tribunal. But the appointing authority is bound - patere legem quam ipse fecisti - to abide by the rules that it has itself issued and that have the force of law. So any breach of them will constitute a fatal flaw in the impugned decision.

4. In support of his objections to the decision not to promote him the complainant puts forward pleas that come under two heads: the breach of equal treatment that is inherent in the EPO's system of reporting and promotion, and misappraisal of the facts.

The system of reporting and promotion

5. The complainant's objections to the reporting and promotion system rest, first, on the principle of equal treatment. He says that that principle requires an organisation to treat likewise everyone on its staff who is in like position in fact and in law. He offers the example of two officials whose work is rated equally good but who complete at different dates the minimum period of reckonable experience required for promotion. As things stand, he argues, one of them may have to keep up the standard of his performance for up to 12 months longer than the other. That is an inherent flaw, even though the President may remove it by applying additional criteria.

6. One preliminary remark is that what the complainant is contending is that the system is misconceived, not misapplied. There is nothing wrong with the President's applying the rules correctly.

7. The complainant offers the academic example of two officials performing the same duties for exactly the same length of time. But those are not the only factors that the President takes into account. The President may apply other criteria, and they include age and length of service. The complainant's abstract reasoning is therefore unconvincing. To show breach of the principle of equal treatment comparison must be drawn between identified staff members in specific circumstances.

8. In the internal appeal the complainant compared his case with that of another staff member he actually named. But that comparison is no more telling. In submissions he put to the Appeals Committee he sought to show that his position was akin to that of his colleague, who was promoted to grade A3 in 1991. And that was again his only plea in his appeal of 26 August 1993. But in this complaint he merely cites the comparison, and in vague terms at that. In any event, the EPO's reply gives information which it says goes to show that the other official's work was better and to explain why it treated him better. There is no evidence to cast doubt on the EPO's case, and the complainant does not contest it. So there is no question of any breach of the principle of equal treatment.

9. The complainant seeks to show the unlawfulness of the system of drawing up ad hoc reports at the Promotion Board's bidding. The purpose of such reports is to determine whether the performance of a candidate for promotion is still as good as it was at the time of his latest appraisal report. In the case of the complainant that meant finding out whether he had kept up in the first half of 1991 the quality of performance he had shown in 1990.

10. He submits that what makes ad hoc reports unlawful is the arbitrariness they introduce into the criteria for promotion. Sundry factors affect the quality of an examiner's work and it is "subject to periodic variation". The result, he says, is that a candidate who meets the conditions laid down during the period set by the Promotion Board gets promoted however good a job he may have been doing at another point in time. The Tribunal will not entertain the plea, which relates, not to any actual dispute, but to potential and hypothetical cases. It may not make general rulings in anticipation of a dispute.

11. It will, however, take up the complainant's contention that the Promotion Board ought to have checked the assessment of his performance at the date of the Board's own meeting. As the complainant himself acknowledges, time is needed to let the reporting officer draft the report and put it to the countersigning officer and the Board. So

the Tribunal is not in a position to say in the Board's stead when the information available suffices for it to make up its mind. In any event the complainant suffered no injury on account of delays in the procedure, which do not affect the date of promotion. That date is for the Board to determine from case to case. As a matter of fact the complainant himself was later promoted to A3 as from 1 January 1992, though he did not complete until 1 April 1992 the eight years' experience required of someone whose general rating was "good". So he has actually gained from the system he is objecting to.

12. So his plea fails: there is no flaw in the reporting and promotion system, be it the making of ad hoc reports or breach of equal treatment.

The appraisal of the evidence

13. The complainant's second plea is that the Organisation wrongly assessed his performance. He contends that, even supposing it was lawful to have an ad hoc report made on his performance in the first half of the year, it should have been rated "very good".

14. Several judgments say that a decision on a staff report, being a discretionary one, may be set aside only on limited grounds such as a mistake of fact or of law or failure to take account of some material fact: see for example Judgments 724 (in re Hakin No. 6), 806 (in re Hakin No. 8) and 1144 (in re Maugain No. 6). The complainant alleges that the Organisation disregarded the unusual circumstances that caused him to be off work for 41.2 per cent of the time in the period in question. His reporting officer, the director of the unit, explained that at length in the report for 1991, and his countersigning officer acknowledged his difficulties by stating in the report "I consider his 'good' to lie towards the top end of this margin" and "Mr. Weber is recommended for a promotion to A3".

15. The plea is unsound both in fact and in law. The text of the ad hoc report shows that though the author did take account of the complainant's absence to attend courses at Strasbourg he still rated his performance only "good", albeit "towards the top end". The next report, for the first eleven months of 1991, included comments on the circumstances that had made the year "rather difficult" for him and gave him the same rating. The Promotion Board's recommendation took full account of those comments, which, contrary to what the complainant says, were not in the least vague. By endorsing that recommendation the President took the view that the promotion was unwarranted and he thereby exercised his discretion. The decision shows no formal or substantive flaw and it must stand.

16. Since the complainant fails in his main claim, to the quashing of the impugned decision, his claims to moral damages and costs are also disallowed.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Edilbert Razafindralambo, Judge, and Mr. Pierre Pescatore, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 6 July 1995.

(Signed)

William Douglas
E. Razafindralambo
P. Pescatore
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.