

EIGHTY-THIRD SESSION

In re van der Laan (Nos. 1 and 2)

Judgment 1654

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Hylke van der Laan against the European Patent Organisation (EPO) on 11 January 1996 and corrected on 20 March, the EPO's reply of 10 June, the complainant's rejoinder of 26 August and the Organisation's surrejoinder of 30 September 1996;

Considering the second complaint filed by Mr. van der Laan against the EPO on 26 August 1996, the EPO's reply of 31 October 1996, the complainant's rejoinder of 20 January 1997 and the Organisation's surrejoinder of 27 February 1997;

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 cases and the pleadings may be summed up as follows:

A. The complainant, who is Dutch, joined the European Patent Office, the EPO's secretariat, in August 1980. At the material time he was Director of Personnel Administration at grade A5.

When the Principal Director of Personnel retired on 31 January 1992 the post was left vacant.

On 14 December 1994 the President of the EPO's Administrative Council announced to the staff that Mr. Ingo Kober would take over from Mr. Paul Braendli on 1 January 1996 as President of the Office.

On 21 December the Office announced an internal competition to fill the post of Principal Director of Personnel, which was graded A6. The closing date for applications was 18 January 1995. Four of the five Vice-Presidents of the Office objected on the grounds that the announcement was hasty and that the President-to-be and the future Vice-President in charge of Administration should be consulted.

On 18 January 1995 the complainant applied for the post. So did Mr. Volker Ahmann, the head of the President's office. On 18 January the chairman of the Promotion Board, and on 20 January the President of the Office, called upon the Vice-President in charge of Administration, who was the complainant's supervisor, to write by noon on 24 January a report on the complainant's performance in the last few years. In a minute of 24 January the Vice-President stated that his "comments had to be written under unacceptable pressure of time, which has adversely affected their quality". The complainant objected to some of his remarks and said he had not been given enough time in which to comment.

The Promotion Board saw Mr. Ahmann on 25 January and Mr. van der Laan on the 26th. In their report of the 27th the majority recommended both applicants but put Mr. Ahmann first. The same day the President appointed him as Principal Director of Personnel as from 1 February 1995. By a letter of 17 February the President informed the complainant that he had been unsuccessful. The complainant lodged an internal appeal on 3 March against that decision.

The Appeals Committee scheduled hearings for 6 September 1995 but its chairman adjourned them to 16 November because the complainant was ill. In a letter of 12 September 1995 to the chairman the President asked the Committee to report by 15 October 1995 on the grounds that the delay was damaging to the Principal Director of Personnel's position and so to the functioning of the Office itself; come what might, he would take his final decision after 16 October and waive the internal appeal if the Committee had not

reported by then. By a letter of 16 October he told the complainant that he had withdrawn the case from the Committee and was rejecting the appeal. The Committee nonetheless submitted a report on 20 November 1995. It said that it was an independent body; citing Judgment 852 (*in re Benze* No. 5), it held that by withdrawing the case on the grounds that the Committee had failed to report by 15 October 1995 the President had acted *ultra vires* and in breach of the procedural safeguards that staff had against arbitrary decisions; and it therefore declined to give an opinion.

On 11 January 1996 the complainant filed his first complaint against the President's decision of 16 October 1995.

By a letter of 22 January 1996 the new President, Mr. Kober, told the complainant that he was withdrawing his predecessor's decision of 16 October 1995. The same day he referred the appeal again to the Committee and asked it to give the case priority. In its report of 12 April 1996 the Committee unanimously recommended allowing the appeal, reversing the appointment of Mr. Ahmann and ordering "a new selection/promotion procedure". It refrained from making a recommendation on the claim to damages on the grounds that the matter was before the Tribunal. The President accordingly took a new decision on 4 June 1996: he reversed the former President's decision of 27 January 1995 to appoint Mr. Ahmann; but he at once reappointed Mr. Ahmann as Principal Director of Personnel and upheld any decision he had taken since 1 February 1995; and he promised that Mr. Ahmann would suffer no injury, that any reasonable costs incurred by the complainant would be met and that he should also get 5,000 German marks in moral damages. That is the decision the complainant is impugning in his second complaint.

B. In his first complaint Mr. van der Laan submits that the President's decision of 16 October 1995 was unlawful because the process of selection was a mere sham calculated solely to have the head of the President's office appointed to the vacancy. He has three pleas: breach of the rules on promotion, breach of due administrative process and abuse of authority. He alleges serious moral injury. Although the present President has reversed the impugned decision, he has neither cancelled the appointment of Mr. Ahmann nor ordered a new and proper procedure. The complainant therefore asks the Tribunal to quash the President's decision of 16 October 1995, order the resumption of the process for appointing the Principal Director of Personnel and distribution of the text of the judgment to all the Office staff, and award him moral damages and costs.

In his second complaint he submits that the decision of 4 June 1996 is unlawful as well. Again he has three pleas. First, the President made a mistake of law, or at least drew obviously wrong conclusions from the evidence, by failing to order a new process of selection. Secondly, the Organisation's bad faith is plain from the merely formal reversal of Mr. Ahmann's appointment and from the reasons that the President offered for his decision. Thirdly, citing Judgment 431 (*in re Rosescu*), the complainant pleads misuse of authority: although the President did not act *ultra vires* he used his authority for an improper purpose. The amount of compensation granted by the impugned decision is not commensurate with the moral injury. The complainant seeks the quashing of that decision and maintains his other claims.

C. In its replies the Organisation asks the Tribunal to join the two complaints and, whatever the outcome, to dismiss the complainant's claim to costs on the grounds that he has run up needless expense by filing a second complaint instead of seeking a stay of proceedings pending submission of the Appeals Committee's report. It contends that the reversal of the impugned decision takes all substance from his first complaint. In answer to his plea about a mistake of law or the drawing of wrong conclusions it cites the Committee's view that the process of selection had been sound and the President right to endorse the Promotion Board's recommendation. It denies bad faith. The Committee saw abuse of authority only in the decision of 27 January 1995, which has been reversed, and the complainant adduces no evidence to back up his contention that the second one was likewise flawed. As to his claim to moral damages, both he and the other candidate were treated alike and his good name has not suffered for his failure to get the post. Save in quite exceptional circumstances the Tribunal holds that the quashing of the impugned decision affords redress enough. So indeed thought the Appeals Committee. As for the circulation of the text of the Tribunal's ruling, all judgments are made available to the staff.

D. In his rejoinders the complainant contends that an application for a stay of proceedings would have run counter to the Tribunal's own rules. On the merits he maintains that the reversal of the first decision was a mere formality. He questions the good faith of Mr. Ahmann, who, he says, was partly responsible for the

hasty convening of the Promotion Board, and expresses surprise at the Organisation's wanting to shelter Mr. Ahmann from the adverse consequences of the reversal. He wants to see the judgment posted up on EPO premises or published in the *EPO Gazette*.

E. In its surrejoinders the Organisation denies that reversing the decision of 16 October 1995 was a token gesture: the purpose was to acknowledge the bias of the former President without casting doubt on the process of selection, which, as the Appeals Committee had held, was proper. Though Mr. Ahmann did play a part in issuing the notice of the vacancy, he was just discharging his own duty, which was to see that the Organisation followed the right procedure. By ensuring that the reversal of his appointment caused him no injury the EPO was acting on the case law, which says that someone who accepts an appointment in good faith should suffer no material injury on account of any flaw in the decision. The Organisation has no reason to give the judgment publicity, having given none to the complainant's application for the post or to his failure to get it.

CONSIDERATIONS

The material facts

1. The complainant joined the staff of the EPO in Munich in August 1980 at grade A3. On 1 January 1988 the Organisation promoted him to grade A5 as Director of Personnel Administration.
2. The post of Principal Director of Personnel fell vacant on 31 January 1992, but the incumbent continued to serve "on a contractual basis" -- so said the President of the Office in a communiqué of 14 January 1992 -- so as to obviate "changes in the management of Principal Directorate Personnel". In June 1994 the EPO commissioned a firm of consultants to carry out a review of the Personnel Directorate. It reported towards the end of the year. On 21 December 1994 the EPO announced a competition (PROM M/55) for the post of Principal Director of Personnel, setting the closing date for applications at 18 January 1995. On 22 December 1994 the President of the Office told the five Vice-Presidents that he had appointed the Principal Director of Administration to chair the Promotion Board.
3. On 18 January 1995 the complainant applied for the post. The only other candidate short-listed with him was Mr. Ahmann, the head of the President's own office. There was a third candidate whom the Board did not endorse.
4. On 20 January 1995 the chairman of the Promotion Board told the complainant that it was to meet on 25 January and called him for interview. At his request the interview was held over until the 26th. On the 27th, after a further meeting, the Board made a majority recommendation putting Mr. Ahmann first. On the same day the President endorsed that recommendation and appointed Mr. Ahmann.
5. On 17 February 1995 the President told the complainant that he had been unsuccessful. In a minute of 3 March the complainant asked the President to review his decision or, failing that, to treat his minute as an internal appeal. The President referred the case to the Appeals Committee. On 10 April the head of the Legal Service submitted the Administration's brief to the Committee. On 7 September 1995 the chairman of the Committee told the complainant that it would hear him on 16 November. But by a memorandum of 12 September the President asked the Committee to report by 15 October and to rule on nothing but the written evidence should it be unable to hold hearings in time. Its chairman asked the complainant to comment and he answered that he wanted hearings. On 16 October, however, the President sent the complainant a letter to say that he had decided to remove the case from the Committee and, deeming the internal remedies to be exhausted, to reject his appeal.
6. On 24 October 1995 the President wrote to the chairman of the Appeals Committee to express surprise at learning that the Committee would still be hearing the complainant on 16 November and to explain that any hearings and any report by the Committee would be null and void. The Committee nevertheless met on 16 November and under cover of a note of 20 November submitted its report to the President. It said that, since it was unable to perform its task properly and since there had been many breaches of due process, it was declining to give an opinion on the merits or to make a recommendation.
7. In a minute of 15 December 1995 the President took the Committee to task for entertaining the case

despite his telling it not to, and for ordering written submissions without his consent and in wilful abuse of its mandate. In a stoutly worded answer of 18 December its chairman asked the President to withdraw his note, which he described as "libellous", and said he would go to the Tribunal over the matter.

8. In his first complaint, filed on 11 January 1996, the complainant is challenging the decision of 16 October 1995.

9. By letters of 22 January 1996 Mr. Kober, who had taken over as President on 1 January, told the chairman of the Appeals Committee and the complainant that he was reversing the decision of 16 October 1995. He asked the chairman that priority be given to the case.

10. On 12 April 1996 the Committee unanimously recommended cancelling the appointment of Mr. Ahmann and resuming the process of selection. By a decision of 4 June 1996 the President endorsed the Committee's recommendation for cancelling the appointment but refused to resume the process of selection. Citing the majority recommendation by the Promotion Board, he appointed Mr. Ahmann as Principal Director of Personnel as from that date.

11. That is the decision impugned in the second complaint.

Joinder

12. The Organisation applies for joinder. Since both complaints arise out of disputes that raise the same issues of fact and of law they are joined to form the subject of a single judgment.

Receivability

13. The defendant pleads that the first complaint is irreceivable on the grounds that, the impugned decision of 16 October 1995 having been reversed, it discloses no cause of action.

14. The plea succeeds. That decision dismissed the complainant's internal appeal of 3 March 1995 against the decision by the then President to reject his application for the post of Principal Director of Personnel and to appoint Mr. Ahmann. The new President's decision of 4 June 1996 overruled that decision and thereby satisfied the complainant's claim to the quashing of it. Since it shows no cause of action his first complaint is irreceivable. As for the second complaint, its receivability, which the defendant does not dispute, is not in doubt.

The merits

15. The material issues are the appointment of Mr. Ahmann as Principal Director of Personnel and the rejection of the complainant's own candidature on the Promotion Board's recommendation.

16. How far will the Tribunal go in reviewing an appointment made on the strength of a notice of vacancy and a process of selection? There is a firm line of precedent on the subject. As has often been said, an appointment by an international organisation is a discretionary decision. Being subject to limited review, it may be set aside only if it shows some fatal flaw. Breach of a rule of form or of procedure and a mistake of law or of fact are examples of such flaws. But the Tribunal will be especially wary in such cases: it will not replace the organisation's rating of the candidates with its own. See Judgments 1077 (*in re Barahona*) under 4, and 1549 (*in re López-Cotarelo*), under 9.

17. To challenge the lawfulness of Mr. Ahmann's appointment the complainant has three pleas: (1) a mistake of law or at least the drawing of wrong conclusions from the evidence; (2) breach of good faith; and (3) blatant abuse of authority.

18. Under the first head he objects to the new President's reversing the decision of 16 October 1995 only to take the very same decision himself and appoint Mr. Ahmann and refusing the new process of selection that the Appeals Committee had recommended in its report of 12 April 1996. In support of that recommendation the Committee said that, though the procedure followed by the Promotion Board was "in accordance with the statutory requirements", it should be "set aside" because its purpose had been the appointment of Mr. Ahmann and because the President had not been impartial.

19. The plea fails. In support of its conclusion that the sole purpose of the procedure was to appoint Mr. Ahmann the Committee cites several circumstances. Foremost are the haste in announcing the vacancy and in filling the post, the failure to consult the Vice-Presidents, and the exclusion of external applicants and of internal ones at grade A6, only grade A5 employees being allowed to apply. But those circumstances are all prior to the date of referral to the Promotion Board and cannot in any way affect the lawfulness of the actual process of selection. The Appeals Committee itself implied that there had been nothing wrong with the membership of the Promotion Board, the choice of its chairman being quite in order, nor with the procedure it followed, nor with its report. The Committee's conclusion was that the Board had been "successful in this case in avoiding any of the mistakes which would have nullified the procedure". So the President acted correctly in rejecting the Committee's recommendation for a new process: such process would have done nothing to purge the flaw in the previous President's decision, namely his lack of impartiality. In acting as he did the new President made no mistake of law and, contrary to what the complainant contends, the conclusions he came to on the evidence were not wrong.

20. Nor does the Tribunal see in the impugned decision any breach of good faith or abuse of authority. The complainant may have been sorry to find that the quashing of the decision of 16 October 1995 to confirm the one of 27 January 1995 had no effect because Mr. Ahmann was at the same time reappointed. Yet the appointment was sound in law: it followed a process of selection which was correct. The legal safeguards that any employee may expect were observed. And the complainant has shown no abuse of authority. The President acted *intra vires* and for the sole purpose of filling the vacancy when he picked the candidate whom the Promotion Board had, quite properly, put first.

21. The upshot is that the complainant's claim to the quashing of the impugned decision cannot succeed and that his claims to damages must fail too.

DECISION

For the above reasons,

The complaints are dismissed.

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

Delivered in public in Geneva on 10 July 1997.

(Signed)

William Douglas
E. Razafindralambo
Julio Barberis
A.B. Gardner