

EIGHTY-THIRD SESSION

In re Weaver

Judgment 1671

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Malika Weaver against the European Patent Organisation (EPO) on 14 June 1996 and corrected on 26 July, the EPO's reply of 24 October, the complainant's rejoinder of 28 November 1996 and the Organisation's surrejoinder of 24 January 1997;

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

Having examined the written submissions and disallowed the complainant's application for hearings;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. Directorate-General 2 (DG2) of the European Patent Office, the EPO's secretariat, is in Munich. Its main function is the substantive examination of patent applications. At the material time the complainant, who is French, was an examiner in Munich at grade A2 and she had been since 1989.

On 16 March 1992 the Vice-President in charge of DG2 published a "Note to all examining staff concerning the reporting period 1992/1993". It explained what was meant by an examiner's "fair contribution" to production.

A note from the President of the Office to the chairman of the Promotion Board was published in the *EPO Gazette* of 18 July 1994. It set forth guidelines for drawing up lists of candidates for promotion in 1994 and said:

"The Promotion Boards should be reminded that merit must be considered as the most determining factor in anyone's career and a 'record' can normally only refer to a performance during a period of time much longer than the period covered by the last report."

To qualify for promotion from A2 to A3 someone with a "good" rating of performance was required to have eight years' reckonable experience.

The complainant's performance reports for 1991, 1992 and 1993 gave her a "good" rating and she had a total of eight years' reckonable experience by 1 December 1994.

The list of promotions from A2 to A3 was posted up on 5 August 1994 and published in the *Gazette* of 12 September. The complainant's name was not on it. On 11 October 1994 she lodged an appeal with the President of the Office. On 2 August 1995 the Appeals Committee recommended allowing the appeal by sending the case back to the Promotion Board with instructions to draw up a complete list of those who qualified for promotion in 1994.

The Director of Staff Policy informed the complainant by a letter of 18 October 1995 that her case was to be sent back to the 1994 Promotion Board for that purpose. The Board drew up a new list and this time her name was on it. But the Director of Personnel Management informed her in a letter of 19 March 1996 that the President had decided that it would be premature to promote her to grade A3 in 1994. She challenges the decision on the merits.

B. The complainant submits that she met the criteria for promotion published in the *Gazette* of 18 July 1994: the rating of her performance was "good" and she had eight years' experience.

The fact that the impugned decision mentions "a specific recommendation" in which the Promotion Board referred to the various aspects of her own case shows that the Board looked at her case in isolation and applied to it "unspecified criteria". She points out that in 1994 all A2 examiners were promoted if, like herself, they met in full the requirements for promotion and attained the level of "fair contribution" set by the Vice-President in charge of DG2 on 16 March 1992. The Organisation is therefore in breach of the *patere legem* rule, since "fair contribution" was not one of the criteria for promotion published in the *Gazette* of 18 July 1994.

She asserts that her ranking on the new list, which the Promotion Board was to draw up in order of merit, was not determined by comparison with the other A2 candidates. She asks the Tribunal to order the Organisation to disclose the text of the Promotion Board's "specific recommendation", to which the impugned decision refers, and, should the Organisation reject her arguments, hear witnesses who attended the Board's meeting. Lastly, she pleads discrimination on the grounds that DG2 examiners are required to fulfil an additional condition in order to qualify for promotion.

She asks the Tribunal to order her promotion to grade A3 as from 1 January 1994. She seeks an award of 2,500 German marks in costs.

C. In its reply the Organisation asks the Tribunal to join the complaint with that of Miss Françoise Cottet.

Citing the case law, it points out that the President has discretion in choosing the candidates to be promoted. It submits that promotion is not, as the complainant and the Appeals Committee believe, a foregone conclusion once the criteria set out in the note of 18 July 1994 are met. In his introduction to the note and in accordance with the Administrative Council's, policy the President stressed the importance of merit. So there was every reason for examiners with eight years' experience and a "good" rating who did fulfil the criteria of "fair contribution" to be given precedence over those who had the same experience and rating but lower output. "Fair contribution" is relevant only where a choice has to be made between candidates who meet the minimum conditions. So it is not a new requirement for promotion but an objective means of determining merit, which is an acknowledged criterion for promotion.

The "General Guidelines on Reporting", which were issued in February 1992 and are still valid, provide for the possibility of drawing up "special guidelines" for certain Directorates or types of function.

D. In her rejoinder the complainant submits that merit must be determined not according to just one criterion: it is the employee's performance in general that counts. The criterion of the "fair contribution" excludes all others including the quality of the work. The director of her unit urged his staff to concentrate on quality even if that meant failing to make the "fair contribution". To take account of fair contribution would be to reduce promotion to a mere "mathematical exercise", which in the Organisation's own view is wrong.

E. In its surrejoinder the Organisation contends that "fair contribution" affords the only means of assessing an examiner's output objectively. But failure to meet that criterion does not necessarily rule out promotions: compensatory factors may be taken into account. In the complainant's case, however, there were no such factors. So the Promotion Board was unable to recommend promoting her as from 1 December 1994, and it was on the same grounds that the President declined to promote her.

She was promoted to grade A3 anyway from 1 December 1995.

CONSIDERATIONS

1. The complainant joined the staff of the European Patent Organisation (EPO) on 1 February 1989 as an examiner of patents at grade A2. In EPO *Gazette* No. 17 of 12 September 1994 the Organisation published the list of permanent employees promoted to grade A3 in 1994. Having found that she was not on the list the complainant filed an internal appeal with the President of the Office on 11 October 1994 seeking promotion to A3 as from 1 January 1994. The Tribunal does not have the text of that appeal.

2. The President put the case to the Appeals Committee. In a report of 2 August 1995 the Committee recommended allowing the appeal and sending her case back to the Promotion Board with instructions to draw up a complete list of employees who qualified for promotion in 1994. The Committee took the view that only the conditions announced in EPO *Gazette* No. 14 of 18 July 1994 should determine whether a name went on the list, and that the Promotion Board should forward the list to the President for a new decision on the promotion of the complainant to A3 in 1994.

3. In a letter of 18 October 1995 the Director of Staff Policy told her that the President had endorsed the Committee's recommendation and that the list of candidates who qualified for promotion to A3 should include anyone who met the minimum requirements set out yearly in the *Gazette*. That, the Director said, was why the President had decided to send the matter back to the Promotion Board with instructions to make a complete list of

candidates who qualified for promotion in 1994.

4. The Board drew up the list and put the candidates in order of merit. The President having decided that it was premature to promote the complainant to A3 for 1994, the Director of Personnel Management so informed the complainant in a letter of 19 March 1996.

5. The complainant was promoted to A3 as from 1 December 1995.

The purpose of her complaint

6. The complainant wants the Tribunal to order her promotion to grade A3 as from 1 January 1994. She also claims 2,500 German marks in costs. In the complaint form she gives her present grade as A3. So the only matter at issue is whether her promotion to A3 should be backdated to 1 January 1994.

The criterion of "fair contribution"

7. The complainant submits that because the Administration applied a new criterion of "fair contribution" which did not appear in the notice of promotion published in *Gazette* No. 14 the new requirement was unlawful. The EPO seeks to explain in its reply and surrejoinder that "fair contribution" is not a new requirement for promotion to A3 but a means of ranking candidates according to merit.

8. There is no need to rule on the relevance of the criterion of "fair contribution"; the President endorsed the Appeals Committee's recommendation and so had the Promotion Board draw up a complete list of candidates who met the conditions for promotion to A3 as set out in *Gazette* No. 14. He thereby implicitly acknowledged that "fair contribution" was not a new requirement for promotion to grade A3.

9. The Tribunal is satisfied on the evidence that the Organisation relied on "fair contribution" as a means of determining the relative merit of candidates for promotion, not as a prerequisite for promotion. According to consistent case law a decision not to promote an official is discretionary and subject only to limited review by the Tribunal, which will set it aside only if it was taken without authority, in breach of a rule of form or of procedure, or if there was a mistake of fact or of law, or if some essential fact was overlooked, or if there was abuse of authority, or if some clearly mistaken conclusion was drawn from the evidence.

10. The criterion of "fair contribution", which relates to output, is only one of several that the President may apply and it does not appear unreasonable or arbitrary when used for that purpose. Since applying the criterion of "fair contribution" to determine the order of merit of candidates for promotion is at the President's discretion the decision is not subject to review by the Tribunal save in the circumstances set out in 9 above. On that score the Tribunal need only refer to its comments in Judgment 1670 (*in re Cottet*) also delivered this day.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, 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
Michel Gentot
Julio Barberis
A.B. Gardner