

EIGHTY-FIFTH SESSION

In re Ballester Rodés

Judgment 1770

The Administrative Tribunal,

Considering the complaint filed by Mr. Albert Ballester Rodés against the European Patent Organisation (EPO) on 12 May 1997 and corrected on 26 May, the EPO's reply of 19 September, the complainant's rejoinder of 14 November 1997 and the Organisation's surrejoinder of 19 January 1998;

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 case and the pleadings may be summed up as follows:

A. The complainant, a Spanish citizen who was born in 1955, joined the staff of the European Patent Office, the EPO's secretariat, in October 1991. He was a lawyer at grade A2 in Directorate-General 5 (Legal/International Affairs). He had his appointment confirmed on 30 September 1992 after one year's probation.

The EPO announced in its *Gazette* on 26 July 1993 that the President of the Office would consider promoting from A2 to A3 any staff "with an 'outstanding' record of performance with 6 years', with a 'very good' record of performance with 7 years' and with a 'good' record of performance after acquiring 8 years' reckonable experience". By 1 October 1993 the complainant had over eight years' such experience.

In the original text of his staff report for 1992-93 his general rating for performance was "less than good". He objected to it under the prescribed procedure. By a letter of 13 April 1995 the President set aside the original report and ordered a new one. A second report was made the same day, for 1992-93. On 11 July 1995 the complainant lodged a complaint with the Tribunal against the President's decision. On 21 July he saw the Vice-President in charge of Directorate-General 5 and his reporting officer. He agreed to withdraw his complaint. The Administration gave him another report for 1992-93 and promised to grant him promotion as from 1 October 1993 provided his name appeared on the next list of candidates approved by the Promotion Board. Also on 21 July 1995 he signed a report for 1993-94, which rated his performance "good", and he told the Registrar of the Tribunal that he was withdrawing his complaint. In a report on a meeting it had held in December 1995 the Promotion Board said that, though his case deserved "special attention", "still more must be expected from him". In an addendum the staff representatives of the Board deplored "derogatory" comments in the report and said that the Board ought to have made a list in order of merit of "all eligible colleagues", as the rules required.

In a letter of 22 February 1996 to the President the complainant claimed promotion as from 1993. In a reply dated 29 February 1996 the Principal Director of Personnel gave him notice of rejection. On 9 May he told the President that he wanted to appeal. By a letter of 3 July 1996 the Administration answered that the President had put his case to the Appeals Committee. Before the Committee reported he got notice of promotion to A3 as from 1 February 1996.

In a report dated 5 February 1997 the Committee observed that his only claim was to promotion "with retroactive effect to October 1993". It recommended allowing his appeal "in part" and sending the case back to the Promotion Board for review in the light of the "omission of an essential fact, which is sufficient to vitiate the contested decision not to promote".

In a letter of 10 March 1997 the President told the complainant that the Committee had advised him to reject his request for promotion in 1993 but nevertheless to refer his case to the Promotion Board for "review as to whether [he] should have been promoted in 1995" and that his case was so referred. That is the

decision he is impugning.

B. The complainant submits that the decision is unlawful. He pleads breach of a binding promise he says the Vice-President made him on 21 July 1995 on the President's behalf. That promise was to promote him if his name was on the Promotion Board's list, and the Board infringed his acquired rights by failing to recommend him. In his submission the Board had a duty to apply the rule announced in the *Gazette* and was not empowered to make "negative recommendations". As the Appeals Committee held, the Board's report showed fatal flaws.

There were procedural flaws, too, in the internal appeal: the claim on which the Committee based its recommendation - for promotion as from 1994 or 1995 - was one of its own making. He also pleads breach of due process in the Committee's denial of written proceedings and in its failure to address the main issue: breach of the Organisation's promise.

He seeks the quashing of the impugned decision, promotion to grade A3 as from 1 October 1993 and 10,000 German marks in moral damages.

C. The EPO replies that his complaint is in part irreceivable and in any event devoid of merit. Because he failed to claim moral damages in his internal appeal that claim is now irreceivable under Article VII(1) of the Tribunal's Statute. In answer to his allegation of a binding promise the Organisation points out that the condition *sine qua non* for promotion was that his name should be on the Promotion Board's list. So the case turns, it submits, on whether it was proper for the Board not to put his name on the list.

According to precedent, merely meeting the minimum criteria does not confer any right to promotion. So the Board did not infringe any acquired right the complainant might have had. It had a duty to pick candidates by merit and in doing so it took proper account of comments in his reports suggesting that he had fallen short of reasonable expectations. As for the internal appeal procedure, he had ample opportunity to state his case in writing.

D. In his rejoinder the complainant retorts that his claim to damages is receivable: in Judgment 1398 (*in re* Vollering No. 5) the Tribunal held that a new claim to moral damages was "admissible". The EPO acknowledges its promise, and the material issue is the enforcement of it, not the exercise of discretion under Article 49 of the Service Regulations on promotion. Having mentioned his name in its "reasoned" report, the Promotion Board may be deemed to have put him on the list provided for in Article 49(10). The material condition having been met, the EPO broke its word.

E. In its surrejoinder the defendant observes that there is no new argument in the complainant's rejoinder to make it change its position. It maintains that the Board's failure to recommend him for promotion was warranted by comments in his staff report. Since the Board did not put him on its "recommendation list" there was no breach of promise.

CONSIDERATIONS

1. The complainant joined the staff of the EPO on 1 October 1991 as a lawyer. On the strength of his reckonable experience of six years and eight months the Organisation put him at grade A2. It confirmed his appointment as a permanent employee at the end of one year's probation. On 22 February 1996 he asked the President of the Office to promote him to grade A3 as from 1 October 1993, and the decision to refuse that claim is what he is impugning in his complaint. But he did get promotion to A3 as from 1 February 1996, and so now his only claims are to the backdating of it to 1 October 1993 and to an award of moral damages.

2. Article 49(7) of the EPO's Service Regulations reads:

"Promotion to a post in the next higher grade in the same category shall be by selection from among permanent employees who have the necessary qualifications, after consideration of their ability and of reports on them. ..."

Article 49(10) reads:

"The President of the Office shall forward to the Promotion Board the names of all permanent employees

who possess the necessary qualifications referred to in paragraphs 7 and 9 ...

The Board shall examine the personal file of all permanent employees satisfying the relevant requirements and may, if it so decides, interview any permanent employee under consideration.

The Board shall draw up and forward to the President of the Office for his decision a list, presented in order of merit, of permanent employees who are eligible for promotion, based on a comparison of their merits, together with a reasoned report."

3. In a note to the chairman of the Promotion Board the President set out the guidelines for listing candidates for promotion in 1993. The note appeared in the *EPO Gazette* of 26 July 1993. Identical guidelines have since been set for promotion in 1994, 1995 and 1996.

4. According to the guidelines staff members at grade A2 who had a "good record of performance" qualified for promotion to grade A3 provided they had at least eight years' reckonable experience, and such "record" normally meant "performance during a period of time - much - longer than the period covered by the last report".

5. The complainant could not have been considered for promotion by the Promotion Board in 1993 and 1994 because his staff report for the period from 1 October 1992 to 30 September 1993 declared his performance to be "less than good". But he contested that assessment and, after conciliation, his supervisors gave him on 21 July 1995 two new staff reports, one covering that period and the other for the period from 1 October 1993 to 31 March 1994. Both assessed his performance as "good".

6. On 11 July 1995 he had filed a complaint with the Tribunal about promotion. He now explains that on 21 July, during the conciliation procedure, the Vice-President in charge of Directorate-General 5 made a promise on the President's behalf that the President "would promote the complainant to grade A3, retroactively with effect from 1 October 1993, if his name appeared in the recommendation list of the Report of the Promotion Board", which was to meet in December 1995, provided he withdrew his complaint. He promptly did so.

7. The Promotion Board met in December 1995. The majority did not recommend the complainant for promotion. The staff representatives, who were in the minority, were in favour of promoting him in 1995 and observed that the majority were in error both in refusing to draw up a full list of employees eligible for promotion in order of merit and in making "any kind of 'recommendation' whatsoever".

8. Since there was no positive recommendation from the Promotion Board, the President decided not to promote the complainant. He appealed.

9. In its report of 5 February 1997 the Appeals Committee observed that the complainant's only claim was to promotion retroactive to 1 October 1993 and it held that his "claim cannot succeed since his probationary period expired only on 30 September 1992 and one year's service following the probationary period was an insufficient basis to establish the record of performance for promotion purposes". Having recommended the rejection of the appeal insofar as it related to promotion in 1993, the Committee went on to consider whether a claim to promotion in 1994 or 1995 might succeed. It concluded that the Promotion Board had no power to exclude from its list candidates who were eligible for promotion and that, since the Board had had no report on the complainant's performance in the period from 1 April 1994 to 30 June 1995, its failure to call for one amounted to "omission of an essential fact". The Committee doubted whether the Board should have referred to the change in the assessment of the complainant's performance after conciliation. It doubted, too, whether the criterion of "fair contribution", which is applicable to patent examiners, ought to have been applied to him, particularly since he had not been told what a "fair contribution" meant in the work he was doing and the criterion was not mentioned in the President's note to the Board. The Committee therefore recommended allowing the appeal in part and sending the case back to the Promotion Board for reconsideration in the light of its opinion.

10. By a letter dated 10 March 1997 the President informed the complainant that he had decided to follow the opinion of the Committee and reject his request for promotion in 1993 but, "in order to exclude any possible injustice", was sending his case back to the Promotion Board for "review as to whether [he] should

have been promoted in 1995".

11. The complainant is adamant that his claim is not to promotion under Article 49, i.e. at the President's discretion, but only to the enforcement of the promise made to him on 21 July 1995. He argues that the condition to which that promise was subject had been fulfilled because the Promotion Board had no power to exclude from the list candidates who, like him, qualified for promotion.

12. The EPO pleads that it need not comment on the existence of such a promise because, even if one was made, it was subject to the condition that the complainant's name "appeared in the recommendation list of the Report of the Promotion Board", and the condition had not been satisfied.

13. The complainant's position that a promise was made to him on 21 July 1995 was supported, in the proceedings before the Committee, by the statement of another staff member who was present during the conciliation proceedings. The EPO has not submitted any evidence to the contrary. The Tribunal holds that such a promise was made.

14. The first issue is whether the condition to which that promise was subject was fulfilled. Article 49(10) of the Service Regulations requires the President to forward to the Promotion Board the names of "all permanent employees who possess the necessary qualifications". The complainant contends that the list which the Promotion Board was required to draw up and send to the President had to contain all the names, though put in order of merit. He argues that the Board was free neither to exclude from the list any employee who met the minimum requirements nor to make "negative recommendations" of any kind about those who were on the list; and since the EPO does not deny that he met the minimum requirements he had an "acquired right" to appear in the recommendation list and thus the condition was fulfilled.

15. Even if the complainant were right in his contention that the Promotion Board was not free to exclude his name from the list which it prepared in accordance with Article 49(10), that would mean only that his name should have appeared on that list. But the promise referred to a different list, "the recommendation list of the Report of the Promotion Board". Article 49 makes no mention of a "recommendation list". To determine what was meant by that expression it is necessary to turn to the President's note to the Board. Under "General remarks" the President invited the Board to:

"present [its] recommendations in lists, established in order of merit within each grade, of those the Board considers to have the merit for promotion. The lists must be accompanied with a reasoned report."

That cast a duty on the Board to identify and list only those employees whom it considered fit for promotion. The Board was not bound, as a matter of course, to include the complainant's name in that list of recommendations. Accordingly the relevant condition was not satisfied, and his claim fails.

16. That does not conclude the matter, however. The President decided to send the case back to the Promotion Board for review because the Appeals Committee had found that its proceedings were flawed. The doubts which the Committee expressed over the issue of promotion in 1994 and 1995 were equally applicable to the Board's refusal to recommend promoting the complainant in 1993. Further, the ground on which the Committee relied for recommending rejection of his claim to promotion in 1993 - that one year's service after probation was not enough to constitute a "record" of performance - was not one which the Board had taken into consideration in the light of the particular circumstances.

17. The conclusion is that, in accordance with the President's clear wish to "exclude any possible injustice", the case must be sent back to the Organisation so that the Promotion Board may reconsider the question of promoting him in 1993, 1994 or 1995. But his claim to an award of damages for the moral injury he says he sustained must fail.

DECISION

For the above reasons,

1. The Tribunal quashes the President's decision of 10 March 1997 refusing the complainant promotion in 1993 and sends the case back to the Organisation so that the Promotion Board may reconsider the question of promoting him in 1993, 1994 or 1995.

2. His other claims are dismissed.

In witness of this judgment, adopted on 8 May 1998, Miss Mella Carroll, Vice-President, Mr. Mark Fernando, Judge, and Mr. James K. Hugessen, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 9 July 1998.

**Mella Carroll
Mark Fernando
James K. Hugessen**

A.B. Gardner

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