

EIGHTY-SIXTH SESSION

In re Durand-Smet (No.2)

Judgment 1832

The Administrative Tribunal,

Considering the second complaint filed by Mr. Jérôme Durand-Smet against the European Patent Organisation (EPO) on 18 December 1997, the EPO's reply of 9 April 1998, the complainant's rejoinder of 14 May and the Organisation's surrejoinder of 17 June 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 French citizen who was born in 1942, was seconded in 1980 from service with the French Government to the European Patent Office, the secretariat of the EPO. It has employed him since April 1983 in Directorate-General 2 (DG2), which is in Munich, and on 1 May 1989 granted him grade A4.

In 1996 he applied for an A5 post as a member of a technical board of appeal. The Director of Personnel Management told him by a letter of 8 July 1996 that he had been unsuccessful. Another A4 official, Mr. Domenico Valle, got the post. On 11 July 1996 the complainant lodged an internal appeal against that appointment and claimed the post for himself. His case went to the Appeals Committee, which reported on 5 November 1997. By a letter of 11 November, the impugned decision, the Director of Personnel Development told him that the President of the Office had decided on the Committee's unanimous recommendation to reject his appeal.

B. The complainant is objecting to the Appeals Committee's conclusions. He submits that he qualified as long ago as 1 May 1991 for promotion to A5 whereas other patent examiners who have already had such promotion did not do so. That he sees as a breach of the rules and of equal treatment. Appointments to boards of appeal are "subjective, arbitrary and political". The Committee relied on an immaterial provision of the Service Regulations and ignored his qualifications and the outstanding reports on his performance, which since 1990 have all declared him "fit for membership of a board of appeal". The candidate who got the A5 post was neither as senior nor as seasoned. The EPO would neither let him have the minutes of the selection board's discussion questioning his attainments and behaviour nor put them in his personal file. That shows the President's prejudice against him.

He asks the Tribunal to appoint him as from 1 May 1991 to Mr. Valle's post and to award him at least 250,000 German marks in damages. He claims costs.

C. In its reply the EPO points out that the President of the Office names members of boards of appeal and its Administrative Council appoints them. Article 108(1) of the Service Regulations says that internal appeal lies to the appointing authority that took the impugned decision. Here it was the Council, but the complainant put his appeal to the President instead. So he failed to follow the internal appeal procedure properly. But since nomination by the President is the *sine qua non* of appointment the defendant takes him to be challenging the refusal to name him and will therefore treat his case as receivable.

On the merits it explains that boards of appeal are the last instance in adversarial proceedings for the grant of European patents. Their decisions are authoritative in applying the European Patent Convention. So appointing an employee to membership of one is not just promotion but another process altogether, more akin to recruitment. The President has wide discretion in deciding whom to name. So the reports on the complainant's performance and his supervisors' recurring commendations were not enough to win him nomination. The selection board thought him unequal to the task. As for the minutes of its discussion, he had the opportunity of commenting on them in the internal appeal proceedings.

Having been invited to comment, Mr. Valle says that he is "quite satisfied that the appointment fully complied with the rules of procedure and shows no error whatever".

D. The complainant rejoins that the Chairman of the Administrative Council told him that his appeal should go to the President. He argues that the EPO demands no greater qualifications for recruitment than for promotion and that the defendant is blurring the two. The selection board's findings are irrelevant because they neither square with his performance reports nor appear in his personal file. He infers acquiescence in his appeal from the curtness of Mr. Valle's comments.

E. In its surrejoinder the Organisation presses its pleas. It points out that since the minutes of the board's discussion are not a performance report there is no reason to put them on the complainant's personal file.

CONSIDERATIONS

1. Judgment 1559 of 11 July 1996 gave an account of the complainant's career and took up most of the general issues this case raises.

The complainant duly applied for a post as a member of a technical board of appeal of the EPO. By a letter of 8 July 1996 the Organisation told him that he had been unsuccessful. The post went to Mr. Domenico Valle, an Italian and an examiner of patents, who thus rose from grade A4 to A5. In an internal appeal of 11 July 1996 to the President of the European Patent Office the complainant claimed "appointment to A5 as from 1 May 1991 instead of Mr. Domenico Valle, even if that means cancelling Mr. Valle's recent promotion to A5". The President refused the claim and forwarded the appeal to the Appeals Committee. The Committee recommended rejection. The appeal was, in its view, irreceivable because it was the Administrative Council, not the President, that made appointments to technical boards of appeal. But the Committee observed that according to the material provisions of the European Patent Convention and the Service Regulations it was up to the President to put names of candidates to the Council. Refusal to name someone was a decision of the President's and one subject to internal appeal. The Committee considered whether the President had acted wrongfully in refusing to name the complainant, and it held that he had not. The President endorsed the Committee's recommendation and dismissed the appeal. That is the decision now under challenge.

The complainant is contending that the President was wrong not to name him. The gist of his case is that he wants appointment to the post and an award of not less than 250,000 German marks in damages, particularly for the moral injury he says he has been suffering "for years".

In sum the EPO presses the Committee's and the President's reasoning. It asks the Tribunal to dismiss the complaint and so, by implication, does Mr. Valle.

2. It is doubtful whether the complainant has exhausted his internal remedies as to his claim to damages. At all events the claim is almost the same as the one that he made in his first complaint and that the Tribunal disallowed in Judgment 1559 under 3. Insofar as he is now seeking the damages he was claiming in that complaint the issue is *res judicata*. And insofar as he is claiming damages for any injury he may since have suffered the Tribunal sees no reason to depart from its earlier ruling: see Judgment 1780 (*in re* Kunstein-Hackbarth) under 6(b). The claim fails.

3(a) According to Article 11(3) of the European Patent Convention it is the Administrative Council and not the President of the Office that makes appointments to technical boards of appeal, and under Article 106(2) of the Service Regulations any appeal against a decision of the Council's must go to the Council. If its answer is no, it will, in line with Articles 109(1) and 110(3), refer the case to the Appeals Committee.

Judgment 1559 held in 2 that appeal by the complainant against both the rejection of himself and the appointment of someone else lay to the Council, not to the President. The Tribunal also held the appeal to be obviously out of time. That, by implication, is why it did not remand the case to the Council.

(b) The impugned decision embraces the Committee's reasoning. It departs somewhat from that precedent by taking the view that, though the Council makes the appointment, the President may entertain an appeal against his own decision not to name someone as a candidate on the grounds that he rejects on merit and his choice of candidates is challengeable.

For the reasons set out in (1) and (2) below, that approach will square neither with the written rules nor with the purpose of an appeal by a candidate against his own rejection and the appointment of someone else.

(1) A decision will not be challengeable unless it directly affects a staff member's status in law by determining or altering it. No action will lie if some decision has yet to be taken which the staff member may challenge. Likewise, neither internal appeal nor complaint will be irreceivable if the organisation's rules say that some particular procedure must first be followed: a staff member may not challenge just one element of a complex procedure but only the decision that is the eventual outcome: see Judgment 1694 under 7(c).

The "proposal" that the President has to make for an appointment to a technical board of appeal is obviously not such a decision. The Council does not have to pick any of the President's nominees and may ask him to offer others. Besides, it was not up to the President to take at the time a "decision" of that kind or one under Article 106(1) of the Service Regulations since not until the post was filled did he tell the complainant of rejection.

Quite different is the case where the competent authority starts by discarding a batch of candidates: in that event the rejection affords a cause of action. For the start of the time limit for appeal, see Judgment 1768 (*in re Bodar*) under 4.

(2) An unsuccessful candidate may - so says precedent - challenge both the rejection of himself and the appointment of someone else on grounds of form or of substance that touch on his own application or on that of the successful candidate. And he will, at least by implication and on any reasonable construction of his claims, be challenging the appointment: see Judgment 1768 and the others cited therein. It would be awkward to have one appeal body dealing with the appointment and another with the rejection, since the two issues are or at least may be closely bound up with one another.

The terms of the impugned decision do show just such inconsistency. If the Council may rule on rejection it would be odd to let the President do so too: a conflict of views would be hard to resolve. If the Council is to prevail anyway, why make the President competent as well? Here the complainant is comparing himself and Mr. Valle on merit, and such comparison must be done, where need be, by the same authority and follow the same procedure.

The inevitable conclusion is that the Council alone is competent.

4. There is no substance to the complainant's arguments - so far as one can tell what they mean - for declaring the President competent.

The Appeals Committee said that his appeal should have gone to "the Chairman of the Council". He demurs on the grounds that Article 106(2) says that an appeal should go to the President of the Office and in any event the "appointing authority" is the President, not the Council.

Yet Article 11(3) of the European Patent Convention is crystal-clear: for members of the technical boards of appeal it is the Council that is the appointing authority. And there was nothing wrong with the Committee's saying that the appeal should have gone to the Chairman of the Council: it is ordinarily the Chairman who gets papers intended for a collegiate body.

The conclusion is that the President was wrong to treat the complainant's appeal as a challenge to the refusal to name him for appointment when it was in fact an appeal against the decision to appoint someone else.

5. The President was, however, competent to entertain the complainant's other claims. Indeed that is in line with what the Tribunal held in Judgment 1559.

But for the reasons set out in that judgment and in 2 above those claims cannot, though receivable, succeed on the merits.

6. A staff member who appeals to the wrong body does not on that account forfeit the right of appeal.

Time and again the Tribunal has held that, though rules of procedure must be strictly complied with, they must be construed with common sense and not set traps for the staff member: see Judgment 1734 (*in re Kowasch*) under 3 and the cases there cited.

For one thing, any penalty for breaking such a rule must be reasonably fitting.

The EPO has rules about competence to hear an appeal and about time limits for lodging it. If the staff member appeals in time but makes the wrong choice between Council and President, there is nothing in the rules to prevent correction of the mistake. After all, both Council and President are authorities within one and the same Organisation.

In the case that the Tribunal ruled on in Judgment 1734 the staff member had filed an appeal in time with the defendant's appeal body even though no appeal would lie. The judgment said that there was no treating that appeal as a complaint to the Tribunal and that even a timely internal appeal did not serve to meet the time limit for such complaint.

When there are two authorities that may be competent it is easy enough for one to forward a misdirected appeal to the other. If the staff member filed it in time, even with the wrong authority, then it will be receivable, and that authority will simply forward it without ado to the other one. Forwarding it will of course serve no purpose if it was filed out of time. Nor will the Tribunal afford any relief for the consequences of turning to the wrong body if the staff member knew it was the wrong one but addressed it for the purpose of pursuing some unactionable interest.

That the complainant's appeal should go to the competent body was the more reasonable because he had addressed it to the President, who could have had no difficulty over passing it on to the Council.

The conclusion is that, insofar as the Council is competent to entertain it, his appeal should go to it for decision.

7. Since the Council has not yet taken up his appeal, there is no need to rule on the merits.

DECISION

For the above reasons,

1. The impugned decision is set aside insofar as it relates to the complainant's claims challenging the rejection of his own application and the appointment of Mr. Domenico Valle.
2. To that extent the case is sent back to the Administrative Council of the EPO for decision.
3. The Organisation shall pay the complainant 1,000 German marks in costs.
4. His other claims are dismissed.

In witness of this judgment, adopted on 13 November 1998, Mr. Michel Gentot, President of the Tribunal, Mr. Jean-François Egli, Judge, and Mr. Seydou Ba, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 28 January 1999.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

A.B. Gardner