

## FORTIETH ORDINARY SESSION

### ***In re* TYBERGHIEN**

#### **Judgment No. 347**

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint brought against the International patent Institute by Mr. Gérard Michel Petrus Tyberghien on 4 March 1977 and the Institute's reply of 5 April 1977;

Considering Article II, paragraph 5, and Article VII of the Statute of the Tribunal and the Institute Staff Regulations;

Having examined the documents in the dossier, oral proceedings having been neither applied for by the parties nor ordered by the Tribunal;

Considering that the material facts of the case are as follows:

A. The complainant joined the staff of the Institute on 1 October 1970 as an examiner, when the former Staff Rules still applied. When new Staff Regulations came into force he was graded at A8, step 1, with three months' seniority in that step and with effect from 1 January 1971, in accordance with a table of equivalents approved by the Administrative Council. By the same decision he was promoted to A7, step 1, with effect from 1 October 1971, the date on which his probationary period came to an end.

B. By a decision of 5 February 1976 which he took on the recommendation of the Careers Committee the Director-General promoted the complainant from A7 to A6 with effect from 1 October 1975, the anniversary of the date both of his promotion to A7 and of his original appointment. All promotions of officials to A6 on 5 February 1976 took retroactive effect from the date in 1975 which was the anniversary of their entry to grade A7. On 26 May 1976 the Director-General announced that there would be further promotions from A7 to A6 for 1975. By a decision of 24 December 1976 and on a further recommendation by the Careers Committee he promoted another six staff members, again with retroactive effect from the date in 1975 which was the anniversary of their entry to A7.

C. The complainant saw an anomaly in the fact that by that decision other staff members had been promoted who had either the same seniority as himself but lower performance marks or else the same marks but lesser seniority. He took the view that he had met the "minimum conditions for his second promotion on 1 January 1975" and that "that was the date on which his promotion should have taken effect". On 5 January 1977 he lodged an appeal. It was dismissed on 7 February 1977, and that is the decision he impugns.

D. The complainant repeats the arguments summarised in C above. He further contends that had he joined the staff on 1 January 1971 and not on 1 October 1970 his second promotion would have taken effect on 1 January 1975: "because he joined the staff three months earlier" his promotion has taken effect several months later and he has fallen 12 months behind others who are no more deserving. Lastly, he relies upon Judgment No. 262 in re Lamadie, a case he regards as comparable to his own. His claims for relief read: "I ask the Tribunal to review the

Director-General's decision as to whether or not to promote me on grounds of mistake of fact, abuse of authority and failure to take account of essential facts".

E. The Institute contends that Judgment No. 262, which the complainant cites, is irrelevant. In 1974 the criteria for promotion had been laid down and communicated to the staff; in 1975, on the other hand, the Director-General decided on the promotions by putting each official in an order of merit as is provided for in the Staff Regulations, which say nothing of "criteria". Hence "the complainant cannot properly rely upon any criterion which would mean automatic promotion on the date on which some condition or other was met". The decision that the complainant's promotion to A6 should take retroactive effect from 1 October 1975 is not tainted with any of the flaws which

entitle the Tribunal to interfere. There is nothing unfair to the complainant in the decision of 24 December 1976, which is merely supplementary to that of 5 February 1976 and relates to the promotion to A6 of those who were not in the original list of promotions because they were thought less deserving. The first few in order of merit, including the complainant, cannot claim any advantage over staff members further down the list. The complainant contends that he was less fairly treated than those on the second list of promotions because the date on which their promotion took effect was the date in 1975 which was the anniversary of their entry to A7. The Institute replies that the Director-General is under no duty to determine at any time whether a staff member deserves promotion, let alone grant automatic promotion on the date on which a staff member fulfils certain conditions of seniority and marking. "That would be tantamount to making him grant promotion solely by the adoption of criteria." The complainant cannot properly take the Director-General to task for making the comparison of merits required by the Staff Regulations, far less for setting the date on which the promotions should take effect. Besides, the complainant benefited from the latter decision since the Director-General was in no way bound to decide that promotions should take effect retroactively: he might merely have granted promotion with effect from some future date. The complainant's argument that he would have been promoted on 1 January 1975 had he joined the staff three months later and not on 1 October 1970 is based on a mistaken assumption that there is such a criterion. The Institute therefore asks the Tribunal to dismiss the complaint as utterly unfounded.

#### CONSIDERATIONS:

As to the defendant:

1. On 4 March 1977 the complainant filed the complaint against the International Patent Institute, which had appointed him to its staff on 1 October 1970. By an agreement signed on 19 October 1977 the Institute was integrated into the European Patent Office, the secretariat of the European Patent Organization (EPO). Having recognised the jurisdiction of the Administrative Tribunal, with the agreement of the ILO Governing Body, from 1 January 1978 the EPO replaced the Institute in disputes with its staff members still pending at that date before the Tribunal. Thus in this case the EPO has become the defendant.

As to the decision which may be impugned:

2. On 5 February 1976, on a recommendation which the Careers Committee had made on 27 January, the acting Director-General promoted the complainant from A7 to A6, step 1, with no seniority at that step and with effect from 1 October 1975. The complainant failed to impugn that decision within the period of ninety days prescribed in Article VII, paragraph 2, of the Statute of the Tribunal and it has therefore become final. Not only is it not now open to challenge but the arguments put forward against it are irreceivable. The Careers Committee made a further recommendation on 1 December 1976 and on 24 December the Director-General promoted from A7 to A6 six officials whom he had earlier refused to promote. On 5 January 1977, on the grounds that he had been less fairly treated than those officials, the complainant asked the Director-General to make his own promotion take effect on 1 January 1975 and not on 1 October 1975. On 7 February 1977 the Director-General dismissed his request. Although the effect of that decision is the same as that of 5 February 1976, it is an answer to the claim which the complainant first made on 5 January 1977. Since it is not merely confirmatory, it may be impugned before the Tribunal. In so far as the complainant is impugning it his complaint is therefore receivable.

As to the Tribunal's power of review:

3. The subject of the decision of 7 February 1977 is a condition of the complainant's promotion, and the decision is a discretionary one. Hence the Tribunal may quash it only if it was taken without authority or violated a rule of form or of procedure, or was based on a mistake of fact or of law, or if essential facts were not taken into account, or if the decision is tainted with abuse of authority, or if clearly mistaken conclusions were drawn from the facts.

If the Tribunal were to have a wider power of review, the Director-General would, before he decided on promotions, have had to adopt rules or criteria of which the staff were duly informed. He did not do so.

As to the complainant's pleas:

4. The principle of equality, which is embodied in Article 5 of the Staff Regulations, may be infringed in one of two ways: either by treating differently cases which are plainly alike, or by treating in the same way cases which are plainly unlike. The complainant alleges the latter kind of breach. He is mistaken.

On 5 February 1976 the Director-General promoted 28 officials from A7 to A6 and on 24 December another six, or 34 in all. Although all were promoted they were not all in quite the same circumstances. According to the general principles adopted by the Administrative Advisory Committee they fell into two groups: first, those who had completed at least four years' actual service and had shown merit warranting promotion; and, secondly, those who had a shorter record of actual service but had shown exceptional merit. Furthermore, within each of the two groups the officials had more or less different qualities. If the complainant was indeed less well treated than those promoted on 24 December 1976 he would have had to be of plainly greater merit than they. To judge from the documents in the dossier, however, he was not. Although he headed the list in the table drawn up by the Careers Committee on 1 December 1976, he was not so well placed in the list of 5 February 1976, which was drawn up in descending order of merit: he was indeed less well placed on that list than three of the six officials promoted later and no better placed than the other three.

5. The complainant objects to the fact that his promotion took effect on 1 October 1975, later than that of some of the officials whom he treats as comparable. The Director-General decided that each official's promotion should take effect on the date which was the anniversary of his entry to grade A7, i.e. the date on which he had joined the staff. Far from making for inequality of treatment that approach put all those promoted on a par.

6. Lastly, the complainant contends that, had he been originally appointed on 1 January 1971 and not three months earlier, on 1 October 1970, his promotion would have taken effect, not on 1 October 1975, but on 1 January 1975, or ten months earlier. In other words the fact that he joined the staff on 1 October 1970 and not on 1 January 1971 has, he alleges, proved a disadvantage. This argument has no bearing on the promotion of another six officials and hence on the impugned decision of 7 February 1977. Since it is not directed against that decision it is irreceivable. Besides, it is not clear that it is sound. There is nothing to suggest that, had the complainant been appointed on 1 January 1971, the decision of 5 February 1976 to promote him from A7 to A6 would have taken effect on 1 January 1975.

#### DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Maxime Letourneur, President, Mr. André Grisel, Vice-President, and the Right Honourable Lord Devlin, P.C., Judge, the aforementioned have hereunto subscribed their signatures as well as myself, Morellet, Registrar of the Tribunal.

Delivered in public sitting in Geneva on 8 May 1978.

(Signed)

M. Letourneur  
André Grisel  
Devlin

Roland Morellet