

NINETY-SIXTH SESSION

Judgment No. 2299

The Administrative Tribunal,

Considering the fifth complaint filed by Mr J. D.-S. against the European Patent Organisation (EPO) on 10 January 2003, the Organisation's reply of 24 April, the complainant's rejoinder of 23 May and the EPO's surrejoinder of 1 August 2003;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions;

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

A. Facts relevant to this case are to be found in Judgments 1559, 1832, 1891 and 2040, which concerned the complainant's previous cases. On 1 May 1989 the complainant, who worked as an examiner at the European Patent Office, the secretariat of the EPO, was promoted to grade A4. He subsequently applied on several occasions for vacancies for technically qualified members of the boards of appeal at grade A5, without success.

In July 1998 the complainant turned down a promotion to grade A4(2), which was to take effect on 1 June 1998, on the grounds that he deserved grade A5. A list was published on 9 November 2001 giving the names of officials, from various directorates, who had been promoted. The complainant's name was not on the list. By letters of 4 and 5 February 2002 to the President of the Office, the complainant sought promotion to grade A4(2) with retroactive effect to 1 June 1998; failing that he asked for his letters to be treated as internal appeals. On 23 April 2002 he was informed that he had been promoted to grade A4(2) as from 1 November 2001. By letter of 21 June 2002 he asked for the promotion to be backdated to 1 June 1998. In the event that his request was refused, he asked for his letter to be considered as initiating an internal appeal. The matter was subsequently brought before the appropriate appeals committee. The three appeals were registered under references RI/7/02, RI/8/02 and RI/39/02.

Meanwhile, in November 2000, the EPO had advertised four vacancies for technically qualified members of the boards of appeal (mechanics). The complainant duly applied on 27 February 2001. As soon as the vacancies were filled by the Administrative Council, the Director of Personnel Management informed him, by a letter dated 29 June, that his application had been unsuccessful. On 17 September 2001 the complainant asked the Administrative Council to "appoint him directly" as a technically qualified member of a board of appeal with retroactive effect. As he did not receive a reply within the prescribed time limit, he lodged an internal appeal on 7 January 2002. By a letter dated 20 March, the Chairman of the Administrative Council informed him that the case had been referred to the Council's Appeals Committee, under the reference IA/3/02. By a letter dated 30 October 2002, the Chairman of the Council informed the complainant that, in accordance with the Committee's recommendation, the Council had rejected his appeal. That is the impugned decision.

On 5 September 2002 the complainant had applied for another post for a technically qualified member of a board of appeal, but again without success. The appointment on that occasion was announced in Administrative Council document CA/105/02 dated 29 October 2002.

B. The complainant begins by stating that his complaint is in response not only to the decision of 30 October 2002 but also to the decisions of 23 April and 29 October 2002. He contends that the Tribunal must consider all three decisions together, since in his view they are "closely connected".

He considers that the fact that his application was turned down clearly proves that for at least ten years he has suffered "extremely unfair" discrimination. The reasons given for the rejection of his application were, in his view, hardly plausible, considering that he was amply qualified and "should as a matter of course have been promoted to grade A5 in view of his excellent staff reports". He points out that he was never interviewed by the Selection Board and deplors the fact that the Board that considered his application in 1996 made negative statements in its minutes of 2 May of that year regarding his suitability and conduct.

The complainant asks the Tribunal to "find that the appointing authority acted abusively", to grant him grade A4(2) with retroactive effect from 1 June 1998 and to appoint him to grade A5 with retroactive effect, even if such appointment would lead to the quashing of the Administrative Council's decisions of June 2001 and October 2002 by which other candidates were appointed to the vacancies for which he had applied. He also claims damages for moral and material injury, and costs.

C. In its reply the Organisation submits that the complaint is partially irreceivable. It argues that the three decisions to which the complainant objects are not closely enough related to be considered by the Tribunal together. It points out, furthermore, that the complainant cannot challenge before the Tribunal the decision of 29 October 2002, since it has not been appealed against internally; nor can he challenge the decision of 23 April 2002, since the President of the Office has not yet made a final decision. It contends that the complainant's claim to be promoted to grade A4(2) with effect from 1 June 1998 is likewise irreceivable, on the grounds that it was not included in the appeal under reference IA/3/02. Lastly, the EPO submits that the Tribunal is not competent to order the complainant's promotion to grade A5.

Subsidiarily, the Organisation contends that the complaint is unfounded. In its view, the complainant merely reiterates arguments already rejected by the Appeals Committee and/or by the Tribunal in its previous judgments. It asserts that the decision of 30 October 2002 shows no fatal flaw and points out that the Tribunal has only a limited power of review over appointments. The skills required of a member of a board of appeal are not the same as those of an examiner and a first-class examiner will not necessarily make a good member of such a board. It cites Judgment 2040 to the effect that a good performance record in itself would not justify his promotion to a higher grade.

The EPO submits that there is no good reason to believe that the selection procedure was flawed. The Selection Board recommended the candidates that, in good faith, it considered to be best qualified, and it complied with the principle of fair competition between candidates. Moreover, the decision whether or not to interview a candidate is a matter for its discretion. The Organisation points out that the Tribunal has already ruled that the contents of the 1996 minutes are not open to challenge. It explains, furthermore, that it does not lie within the power of the Administrative Council to make a "direct" appointment, or to force the President of the Office to accept any given candidate.

The EPO requests that the complainant be ordered to pay the Organisation's costs as well as his own.

D. In his rejoinder the complainant re-emphasises the close connection between the decisions he is challenging, all three of which he considers as resulting from "the same hostile attitude towards staff". The reason why he did not appeal against the decision of 29 October 2002 was because the post he was applying for was filled only later and he was informed only on 24 March 2003 that his application had been turned down. He reiterates his arguments on the merits.

E. In its surrejoinder the EPO maintains its position regarding receivability. It argues that, in the light of the recommendation of the Promotion Board of 23 July 2003, the President of the Office took a final decision to maintain the date of 1 November 2001 for the retroactive promotion of the complainant to grade A4(2). The time allowed for appeal against that decision will start to run, however, only once it has been notified to the complainant. Furthermore, it points out that the latter has not appealed against the decision of 24 March 2003.

The EPO asks the Tribunal to order that the complainant must pay his own costs.

CONSIDERATIONS

1. The complainant is a grade A4(2) examiner. He has applied on several occasions for grade A5 vacancies for technically qualified members of the boards of appeal, but without success.

(a) He was turned down again when he applied on 27 February 2001 and his subsequent internal appeal was rejected on 30 October 2002. That is the impugned decision.

(b) On 29 October 2002 the Administrative Council announced that it had appointed a chemist as a member of a board of appeal covering the field of mechanics, a vacancy for which the complainant had applied on 5 September 2002.

This decision was not appealed against internally by the complainant.

(c) On 23 April 2002 the complainant was informed that the President of the Office had promoted him to grade A4(2) with retroactive effect from 1 November 2001. The complainant lodged an internal appeal against that decision on the grounds that the promotion should have been backdated to 1 June 1998. This appeal was still pending when the present complaint was filed.

2. The complainant challenges the decisions of 29 and 30 October 2002, on the grounds that he was not appointed a member of a board of appeal, and that of 23 April 2002, on the grounds that his promotion to grade A4(2) was not backdated to 1 June 1998.

He asks the Tribunal to "find that the appointing authority acted abusively", to grant him grade A4(2) with retroactive effect from 1 June 1998, to appoint him at grade A5 with retroactive effect and to award him damages for material and moral injury as well as costs.

The Organisation submits that the complaint is partially irreceivable and asks for it to be dismissed.

Receivability

3. The complainant asks the Tribunal to consider together on the merits the three challenged decisions on the grounds that they are closely connected.

This request may be understood to mean that the complainant would like the Tribunal not only to maintain the joinder of the three issues challenged in his complaint, but above all to waive the need for internal remedies to be exhausted with respect to the contested decisions of 29 October and 23 April 2002 (see 1(b) and (c) above). In the absence of such waiver, joining the cases could not have the effect of rendering receivable claims which previously were not. If joinder is denied, the Tribunal would have to rule on the receivability of each claim separately.

The Tribunal considers it appropriate to rule at once on all the claims, and in particular on the receivability of those concerning the decisions referred to in the subparagraphs (b) and (c) above.

4. The conditions for waiving the requirement that internal remedies have been exhausted (Article VII(1) of the Statute of the Tribunal) are not presently met. With regard to the decision to promote the complainant to grade A4(2) with retroactive effect, an internal appeal procedure was actually under way at the time this complaint was lodged and there is no reason to waive the requirement that internal remedies must be exhausted, especially since the decision concerned lies with the President of the Office, while the main decision challenged, concerning the rejection of the complainant's application for a post as a member of a board of appeal, lies with the Administrative Council.

The Tribunal is bound to observe that the complainant's appeal against the Administrative Council's decision published on 29 October 2002 was not filed in due time and is therefore time-barred.

Thus, the complaint is irreceivable on these two counts.

5. The claims to rulings in law are also irreceivable, since such pleas could serve in support of claims for annulment of decisions (see Judgment 2251, under 6, and the cited case law, as well as Judgment 2279, delivered this same day).

The application for hearings

6. The complainant has applied for hearings.

Hearings give the parties an opportunity to express themselves. In this case, they have had every opportunity to do so in writing in the course of two exchanges of submissions. Hearings are therefore unnecessary.

On the merits

7. The only material issue is whether the decision turning down the complainant's application for the post of technically qualified member of a board of appeal must be quashed.

The complainant alleges that he has been discriminated against. He points out that as far back as 1991 the Organisation appointed a grade A3 examiner to an A5 post of board of appeal member for which he had applied (see Judgment 2040).

This complaint raises no new issues in relation to those dealt with in the previous judgments concerning the complainant. Those judgments may therefore be referred to, both as regards the scope of the Tribunal's power of review and the examination of the complainant's pleas, subject to the following further considerations.

In this case, the complainant has again had an application for the post of a technically qualified member of a board of appeal rejected, apparently for the same reasons as before. The EPO has pointed out that the duties performed by a member of a board of appeal call for specific qualities which are not necessarily the same as those of a good examiner. It also draws attention to the fact that, objectively speaking, the chances of any of the 4,000 or so examiners ever joining the 80 technically qualified members of the boards of appeal are "remote".

The complainant considers that he was discriminated against because the Selection Board did not grant him an interview. Obviously the Board decided that, in the light of the candidacies submitted, an interview would not be necessary because it considered that it made procedural sense not to call a candidate who, in its opinion, appeared to be unsuitable for the vacancy concerned, which does not preclude the possibility of comparing the merits of all the candidates in the event of a subsequent challenge.

According to the complainant, the reasons given by the EPO for rejecting his application were not plausible. He casts doubt on the Organisation's good faith and suggests that it did not abide by the rules of fair competition between candidates. However, he merely expounds his own merits without either arguing or trying to demonstrate that the candidate who was eventually selected and appointed was less qualified than he was to be a member of a board of appeal. He has also failed to show in what respect the selection procedure was flawed. It was up to the complainant to submit detailed arguments with supporting evidence. Both his pleas and the evidence he has produced, however, are unconvincing (regarding reasons for decisions to reject candidates, see Judgments 958, 1355, 1990 and 2035; for the Tribunal's limited power to review appointments, see Judgments 1077 and 2250).

In any case, it is not for the Tribunal to appoint the complainant either to the post he applied for or to a specific grade, as he requests.

8. Since the complaint fails, so do the subsidiary claims for damages.

9. Although the Organisation requested in its reply that the complainant should meet its costs as well as his own, it implicitly withdrew that claim in its surrejoinder, where it asks for the complainant to pay only his own costs. It shall be so.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 19 November 2003, Mr Michel Gentot, President of the Tribunal, Mr Jean-

François Egli, Judge, and Mr Seydou Ba, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 4 February 2004.

(Signed)

Michel Gentot

Jean-François Egli

Seydou Ba

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 20 February 2004.