

SIXTY-NINTH SESSION

In re ASSOIGNA

Judgment 1016

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mrs. Rita Assogna against the European Patent Organisation (EPO) on 30 May 1989 and corrected on 26 June, the EPO's reply of 12 September, the complainant's rejoinder of 16 October 1989 and the EPO's surrejoinder of 5 January 1990;

Considering Article II, paragraph 5, of the Statute of the Tribunal and Articles 47 and 107(1) of the Service Regulations of the European Patent Office, the secretariat of the EPO;

Having examined the written evidence and decided not to order oral proceedings, which neither party has applied for;

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

A. As is explained in Judgments 657 (*in re* Metten, Spiekermann and Stern), 855 (*in re* Bergdahl) and 953 (*in re* Theuns No. 2), the Administrative Council of the EPO has approved guidelines on promotion which are set out in document CA/20/80. They provide that to qualify for promotion to grade A3 the staff member must have completed two years' service at A2 and have from five to eight years' reckonable experience. The better the general rating of his performance the shorter the period will be. If the general rating is 3 ("good") the period is eight years. On 1 August 1985 the President of the Office approved new rules in circular 144 to be applied as from 1 January 1985 on how to reckon the experience of A staff for the purposes of recruitment and promotion.

The complainant, an Italian citizen, joined the EPO at The Hague on 7 January 1980 as an assistant examiner of patents at grade A1. She was transferred to West Berlin in 1981. She was promoted to A2 as an examiner as from 7 January 1982. She was again transferred, to Munich, at 15 April 1985. By 31 May 1987 she had to her credit eight years' seniority for the purpose of promotion as reckoned according to circular 144. The general ratings of her performance in her staff reports for 1982-83 and 1984-85 were "good"; an "informal report" covering the period from 15 April to 14 October 1985 described her performance as "satisfactory"; another "informal report" for the period from 15 October 1985 to 14 April 1986 spoke of her "obvious efforts"; and a staff report for the period from 15 April to 31 December 1986 again rated her "good".

The list of examiners promoted to A3 in 1987 was announced on 24 July 1987 after the meeting of the competent promotion board earlier that month. Finding that she was not on it, the complainant wrote on 21 August to the President of the Office observing that she had qualified for promotion by the end of May. The Administration having rejected that view on 23 November, she lodged an appeal under Article 107(1) of the Service Regulations on 17 December 1987 in which she further objected to her not being in the additional list of promotions the promotion board had issued in September. In its reply of 25 May to her appeal the EPO argued that there was one condition for promotion which she had not met, in that her performance had not been consistently rated "good". In its report of 13 February 1989 the majority of the Appeals Committee, interpreting the informal reports on the complainant's performance as rating no higher than 4 ("adequate"), found no flaw in the decision not to promote her and recommended rejecting the appeal; the minority recommended referring the case back to the competent promotion board. By a letter of 3 March 1989, the impugned decision, the Principal Director of Personnel told the complainant that the President had endorsed the majority recommendation. She was promoted to A3 on 1 January 1988.

B. The complainant disagrees that the rating of her performance in the two informal reports was not "good" and that she therefore failed to meet one of the conditions for promotion in 1987. The decision is based on a mistake of fact. Any informal report that assesses performance favourably, even if it has been just "adequate", is to be treated as a "good" rating for the purpose of promotion. Informal reports complement staff reports made under Article 47 of the Service Regulations in the event of transfer, but, being much less detailed than a staff report and not giving any formal ratings of performance, they cannot bar promotion.

In any event the complainant's performance in the periods covered by the informal reports was "on the whole effective" and of the quality expected of a good probationer: they describe the main aspects of her performance as very satisfactory, even though the reporting officer expected improvement in lesser ones.

The majority of the Appeals Committee were wrong to say that she might have been denied promotion even if the informal reports had said her work was "good" because the President had discretion in the matter and the rules on promotion were tightened in 1987. The complainant has a right to know how the rules were changed and there is no evidence to show that they were. At least two officials with eight years' seniority were recommended for promotion in 1987 even though only their last two staff reports had rated their performance "good". It was to her disadvantage that the promotion board did not have before it at its meeting in July 1987 a full report on her for 1986.

C. In its reply the EPO observes that the Tribunal will not replace the President's assessment of an official with its own and will not review the merits of candidates for promotion. Promotion is a discretionary decision, and merely being qualified for it under the rules confers no right to it. The President may take account of several factors: he will consider single aspects of performance as assessed in the latest staff reports, particularly output; he will satisfy himself, even where performance is up to standard, whether it has been so long enough; and he will consider age where he has to choose between candidates. Under the guidelines on promotion he has issued promotion boards make recommendations according to those criteria and any others they may choose to apply.

Although the boards' proceedings are secret and they seldom explain their recommendations, the complainant assumes that the reason for omitting her from the list of promotions recommended for 1987 was the adverse comment on her in the two informal reports. Though the promotion board did not say what importance it had given to those reports, it need not, even if it had treated them as giving her a "good" rating, have recommended promoting her and would have made no serious mistake in not so recommending. Her output had not always been satisfactory. The other candidates who were the same age as the complainant had had consistently "good" ratings and maintained full output, and older candidates, some of them more experienced than she, had also been consistently rated "good" or even "very good". One candidate had had, like the complainant, only "adequate" ratings but was much older than she.

The decision impugned was based on no mistake of fact and drew no mistaken conclusions from the evidence.

D. In her rejoinder the complainant welcomes the EPO's recognition of the need to show that there were reasons for not promoting her even if her informal reports were treated as "good". She contends that the reasons were not to be found in the informal reports, which were no bar to promoting her, though she maintains her subsidiary argument that the ratings in those reports were better than "adequate". There were no evident reasons for not promoting her in 1987. She was discriminated against. The reason for promoting the other official who had had "adequate" ratings was not that he was much older: the board never said that it was, the criteria for promotion are generally seniority and merit, and he had no greater seniority than she. She discusses the ratings of other candidates and concludes that her case was "comparable" to that of the other successful ones. She contends subsidiarily that she ought to have been promoted because she satisfied the requirements as stated, having reached a "good" level of performance.

The promotion board did not have her report for 1986 before it when it made the list. Besides, it is wrong to criticise her output since it may be shown by objective criteria to have exceeded what was required. The reporting officers even said that she should be promoted once she had eight years' seniority, and they would not have said so if her work had been below par.

E. In its surrejoinder the Organisation contends that the rejoinder puts forward no argument that weakens the case in its reply, on which it enlarges. It discusses the qualifications of other candidates for promotion. It submits that it is for the President to decide at his discretion how strictly to apply the various criteria for determining eligibility for promotion and especially, since the guidelines in CA/20/80 on career policy make much of the notion of merit, how to compare the candidates' performance. There was no flaw in the exercise of his discretion in this case. As for the complainant's report for 1986, the promotion board met on 29 September 1987 to see whether any staff reports had been made that would require it to alter the list of promotions it had drawn up at its meeting in July 1987. It then had before it the complainant's report for 1986, which the President had endorsed on 28 September 1987, but it made no change in the list on that account. The fact that it had not had the report before it in July was not to the complainant's detriment because the reservations it contained would have deterred it anyway from putting her on the list, as indeed they did later, in September 1987. The reporting officers' views on whether an official should be

promoted are not decisive: it is the promotion board that makes the recommendation and the President that decides.

CONSIDERATIONS:

1. As is stated under A above, the EPO's guidelines on promotion stipulate that to qualify for promotion from A2 to A3 a staff member shall have not only two years' seniority at A2 but also from five to eight years' reckonable experience. As to the second condition, the official whose general rating is only 3, or "good", must have the full eight years.

2. As from 7 January 1982 the complainant was promoted to examiner and to grade A2. By 31 May 1987 she had eight years' seniority as reckoned according to rules that had been brought in as from 1 January 1985 on how to reckon the experience of A staff for the purposes of promotion and that appear in circular 144.

The material issue in this case is the quality of her performance for the purpose of applying the guidelines on promotion since the ratings of it were not consistent.

Whereas the general ratings in her staff reports from 1982 up to mid-April 1985 were 3, or "good", an "informal report" for the six months up to 14 October 1985 said her performance was only "satisfactory" and another for the next six months mentioned her "obvious efforts" to do better. The general rating in a staff report for the rest of 1986 was again "good".

In answering her internal appeal against the decision not to promote her to A3 in 1987 the EPO pointed out that since she did not have consistently "good" ratings she failed to satisfy the second condition for promotion, even though she did have eight years' reckonable experience. On the grounds that her performance had deserved no better a rating than 4 ("adequate") the majority of the Appeals Board recommended rejecting her appeal, and the President of the Office endorsed that view in the final decision now under challenge.

3. As the Organisation points out in its reply, there are two principles that emerge clearly from the case law and that the Tribunal has consistently abided by in reviewing the President's application of the rules on promotion.

One is that it will neither substitute its own assessment of an official's performance for the President's nor review the merits of candidates for promotion.

The other is that since the grant of promotion is and must remain at the President's discretion, the mere fact that an official may qualify for it under the rules does not confer on him any enforceable right to it. In exercising his discretion the President may take account of particular aspects of performance and determine, even if the official's performance is satisfactory, whether it has been consistently so. What is more, under the guidelines he has issued the promotion boards are free to apply other criteria such as age for the purpose of assessing fitness for promotion.

4. Even if the ratings of the complainant's performance had been consistently "good" and even if she had fully satisfied the conditions for promotion, she would have had no entitlement to the automatic grant of it.

5. In any event the President's discretionary decision to prefer other candidates for advancement shows no flaw that warrants setting it aside. In particular, he neither committed any mistake of fact nor overlooked any essential fact. The Tribunal is satisfied on the evidence that the complainant's output had not always been up to standard. Though her staff report for 1986 gave her a "good" general rating, it said that her efficiency and output could still be improved, and it is reservations such as these that may properly have deterred the promotion board from recommending her.

6. The complainant was not discriminated against: successful candidates for promotion who were the same age as she had had consistently "good" ratings and had kept up a satisfactory output; the older candidates were more experienced and had also been consistently rated "good" or even "very good"; and the one candidate who had no better ratings was older.

7. Lastly, the complainant contends that there was a procedural flaw in that the promotion board ought to have had her report for 1986 before it at its meeting in July 1987.

The answer to that is that, as the EPO states, the board met again in the following September to see whether any staff reports that had come out since its July meeting gave cause to alter the promotions it was recommending. By

September it had at its disposal the complainant's staff report for 1986, but it saw no reason to alter its recommendations on that account.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment by Mr. Jacques Ducoux, President of the Tribunal, Tun Mohamed Suffian, Vice-President, and Miss Mella Carroll, Judge, the aforementioned have signed hereunder, as have I, Allan Gardner, Registrar.

Delivered in public sitting in Geneva on 26 June 1990.

Jacques Ducoux
Mohamed Suffian
Mella Carroll
A.B. Gardner