

EIGHTY-FIRST SESSION

***In re* DURAND-SMET**

Judgment 1559

THE ADMINISTRATIVE TRIBUNAL,

Considering the complaint filed by Mr. Jérôme Durand-Smet against the European Patent Organisation (EPO) on 3 July 1995 and corrected on 9 August, the EPO's reply of 25 October, the complainant's rejoinder of 30 November 1995 and the Organisation's surrejoinder of 8 February 1996;

Considering Articles II, paragraph 5, and VII, paragraph 1, 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 joined the EPO on 1 July 1980 as an examiner at grade A3 at Directorate-General 1 (DG1) of the Organisation's secretariat, the European Patent Office, at The Hague. In April 1983 he was transferred to Directorate-General 2 (DG2) in Munich. He was promoted to grade A4 on 1 May 1989.

In April 1991 he applied for a grade A5 post as member of a technical board of appeal in Directorate-General 3 (DG3).

By a letter of 20 December 1991 the Director of Personnel told him that his application had been unsuccessful. The appointment of Mr. P. Petti, another A3 official, was announced in communiqué 202 of 16 December and in the EPO Gazette of 9 March 1992. In 1993 the complainant applied, again unsuccessfully, for an A5 post. The report on his performance in 1992-93, which was notified to him on 20 June 1994, described him as fit to serve as a member of a board of appeal at grade A5 and thereby confirmed a handwritten remark that the reporting officer had made in the report for 1990-91.

On 15 July 1994 he wrote to the President of the Office relying on Article 49(7) of the Service Regulations, which requires an employee to complete two years' service in one grade in order to qualify for promotion to the next. He sought promotion to A5 as from 1 May 1991 and to A6 as from 1 May 1993 "even if it meant relegating Mr. Petti to A3". Having got no reply, he wrote a letter on 15 September 1994 to the President filing an internal appeal against implied rejection.

In its report of 12 April 1995 the Appeals Committee, to which the case had been referred, unanimously recommended rejecting his appeal as irreceivable on the grounds that he had not met the prescribed time limit for appeal. By a letter of 28 June 1995, the impugned decision, the Principal Director of Personnel informed the complainant that the President had rejected his appeal.

B. The complainant contends that his complaint is receivable. Article 49(7) of the Service Regulations says that promotion to a post in the next grade depends on performance reports among other things. So it was the notification to him on 20 June 1994 of the report for 1992-93 that set off the time limit of three months for appeal against the decision not to promote him to A5 and then A6. Besides, the EPO itself admitted in its reply of 23 January 1995 that his appeal was receivable.

He names five officials who he says were promoted to A5 without completing two years at A4, and four others, including Mr. Petti, who went straight from A3 to A5, whereas the Organisation refused him A5 after two years at A4. It discriminated against him.

He sees a breach of the rules in appointing to an A5 post as a member of a board of appeal an A3 or A4 examiner who has not completed two years in the grade. Promotion being "inextricably linked" to an appointment, the

requirement of at least two years' service in one grade before promotion to the next applies also to the appointment of a member of a board of appeal, as provided for in Article 49(1) a) of the Service Regulations.

He asks the Tribunal to quash all the unlawful appointments and promotions, including Mr. Petti's, order his promotion to A5 as from 1 May 1991 and to A6 as from 1 May 1993 and award him at least 125,000 German marks in damages for serious injury and a sum in costs.

C. The EPO replies that the complaint is irreceivable, because the complainant has failed to exhaust the internal means of redress. For one thing, the quashing of the unlawful appointments and promotions was not part of the claim he put to the President on 15 July 1994; and for another, the three months were long over by the time he made his internal appeal against Mr. Petti's appointment, which was announced on 16 December 1991. He also failed to file his internal appeal within three months of the Organisation's letter of 20 December 1991 turning down his application for an A5 post. His claim to promotion to A6, being contingent upon his claim to promotion to A5, is irreceivable too. The Administration made a mistake in declaring his appeal receivable.

In subsidiary argument on the merits the Organisation rejects the complainant's allegations as unfounded. It sees a difference between appointment to "a" higher grade as a member of a board of appeal, provided for in Article 49(1) a) of the Service Regulations, and promotion to "the next higher grade", provided for in 49(7).

D. In his rejoinder the complainant still maintains that since appointment and promotion depend on performance he became entitled to apply for promotion to A5 upon notification to him of the report on his performance in 1992-93. His complaint is therefore receivable.

In his submission the requirements in Article 49(7) of the Service Regulations for promotion to the next grade apply also to any appointment of a member of a board of appeal that entails promotion.

E. The Organisation presses its pleas in its surrejoinder. It contends that the complainant may not rely on assessment in his performance report to plead that his complaint is receivable.

CONSIDERATIONS:

1. For a complaint to be receivable under Article VII(1) of the Tribunal's Statute the complainant must have exhausted all his internal remedies. The complainant's claim to the quashing of appointments he alleges to be unlawful - apart from Mr. Petti's - is irreceivable because he neither put it to the President of the Office nor made it part of his internal appeal.

2. His claim of 15 July 1994 made by implication a request to the President for the quashing of Mr. Petti's appointment as member of a technical board of appeal and for appointing him instead. In its report of 12 April 1995, which the impugned decision cites, the Appeals Committee held that the complainant had failed to meet the time limit of three months for challenging both the rejection of his application, notified in a letter of 20 December 1991, and the appointment of Mr. Petti, announced in the Gazette of 9 March 1992. His claim to A6, which is a mere corollary of his claim to the quashing of those decisions, is irreceivable for the same reasons.

As the EPO observes, its Administrative Council appoints members of boards, and appeal against a decision by the Council lies to the Council itself under Article 106 of the Service Regulations. If the Council disallows such appeal, it puts the case to a committee set up ad hoc in accordance with Articles 109(1) and 110(3). So the President of the Office was not competent to rule.

At all events the complainant concedes that if the time limit ran from the date at which he had notice of the impugned decision his challenge was late. But he contends that it should run from 20 June 1994, when he learned from his staff report for 1992-93 that he was fit to serve on a board of appeal. The argument holds no water and he does not try to defend it. Since the decision was based on the facts as at December 1991, no later changes of fact could make any difference and warrant waiver of the time limit, even assuming that the other conditions of appeal were met.

3. As for his claim to promotion to A5 as from 1 May 1991 and to A6 as from 1 May 1993 "even if it meant relegating Mr. Petti to A3", the EPO sees it as a corollary of his implied claim to the quashing of Mr. Petti's appointment and of the rejection of his own candidature and as therefore out of time as well. The complainant does not see it that way.

In fact his claims to retroactive promotions to A5 and A6 are time-barred because he has failed to put them forward in the form of an appeal or a challenge to his grading.

Promotions may be granted, according to Article 49(2) of the Service Regulations, so far as vacancies allow. But the complainant has never applied for any vacancy or mentioned one that may have been available.

Nor does he suggest that the promotion he wants might have been granted to him in his present post. The purpose of his complaint is to get promotion by way of redress for the EPO's allegedly unlawful treatment. He pleads breach of its duty under Article 49(7) of the Service Regulations to confine promotions to "the next higher grade" within a category: instead of promoting Mr. Petti from A3 to A5 it should, he says, have granted the promotion to him. And that would have given him the benefit of all the rights he would have enjoyed if he had been appointed to a board of appeal.

The complainant might have put forward such pleas in support of a timely appeal against the result of the competition. His challenge is out of time and so irreceivable.

4.His claim to the quashing of decisions having failed, so do his other claims.

DECISION:

For the above reasons,

The complaint is dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Mr. Jean-François Egli, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 11 July 1996.

(Signed)

William Douglas
Michel Gentot
Egli
A.B. Gardner