

EIGHTY-SECOND SESSION

***In re* Blimetsrieder, Denk and Hofmann (No. 4)**

Judgment 1600

The Administrative Tribunal,

Considering the complaints filed by Mr. Herbert Blimetsrieder and by Mr. Heinz Denk and the fourth complaint filed by Mr. Dieter Gerhard Hofmann against the European Patent Organisation (EPO) on 4 May 1995, the EPO's single reply of 2 August, the complainants' rejoinder of 6 October, the Organisation's surrejoinder of 7 November 1995 and the further submissions which the EPO, at the Tribunal's instructions, supplied on 30 July 1996;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, which none of the parties has applied for;

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

A. The complainants are permanent employees of the European Patent Office, the secretariat of the EPO. In 1993 each of them was promoted to grade A4 on a post for a principal examiner.

They asked the President of the Office in letters they sent in the first half of March 1993 to promote them to A4 at various dates in 1992. The Director of Personnel refused in letters dated 15 and 22 March, and they lodged internal appeals at dates from 19 March to 14 April 1993.

In a single report dated 18 November 1994 on their appeals the Appeals Committee recommended promoting each of them at the date they wanted and awarding the difference in pay plus interest thereon at 10 per cent a year.

By individual letters of 8 February 1995, which they impugn, the President rejected their appeals.

B. The complainants submit that it was unlawful to deny them promotion in 1992. They allege breach of equal treatment. According to the criteria in the President's note of 12 June 1988 to the chairman of the Promotion Board they were entitled to promotion before another official who did get promotion to A4 in 1992. The EPO's reliance on what must have been "subjective" criteria in her favour constitutes a "flagrant misuse of power".

Mr. Blimetsrieder claims his promotion to A4 as from 1 September 1992, Mr. Denk as from 1 February 1992 and Mr. Hofmann as from 1 November 1992. They seek payment of the sums due to them by way of remuneration at the higher grade, plus interest at 10 per cent a year, and awards of 3,500 German marks each in moral damages and of 4,000 marks each in costs.

C. In its reply the EPO contends that the President's decisions not to promote the complainants in 1992 were taken in the proper exercise of his discretion. Fulfilment of the conditions "imposed" does not entitle anyone to promotion since they constitute a "minimum" standard which the President may raise as he sees fit. Since "extraordinary" circumstances warranted promoting the other staff member in 1992 there was no breach of equal treatment. Besides, even if her promotion had been unlawful that would not have warranted promoting the complainants: there must be equality in observance of the law, not in the breach of it.

D. In their rejoinder the complainants enlarge on their pleas and press their claims. In their submission the President erred by assessing the other staff member's merits against criteria other than the objective ones that governed the appraisal of their own performance.

E. In its surrejoinder the Organisation presses the arguments in its reply, maintaining in particular that it was in its interests to promote the other staff member in 1992.

CONSIDERATIONS

1. The European Patent Organisation employs the complainants as principal examiners. They were all promoted to grade A4 as from various dates in 1993 but they claim the promotion as from various dates in 1992. The dispute arose when another staff member was promoted from A3 to a post of principal administrator at A4 as from 1 August 1992.

2. Promotion is governed by Article 49 of the Service Regulations. Paragraph 2 provides that no promotion may be granted unless there is a vacant post in the category or grade concerned; paragraph 4 that the President of the Office must make his decision after consulting a Promotion Board. According to paragraph 5 the Board is made up of a chairman, two members nominated by the President and two nominated by the Staff Committee. The chairman votes only on procedural matters or in the event of a tie. Paragraph 7 states that promotion shall be by selection from among permanent employees who are found after consideration of their ability and of reports on them to qualify. Paragraph 10 requires the President to forward to the Board the names of those who qualify. The Board then -- says paragraph 10 -- examines the personal files of each of them and may interview any if it wishes. It draws up a list of them in order of merit and submits it to the President together with a reasoned report.

3. The President issued guidelines to the Promotion Board in a note dated 12 June 1988. It says that promotion from A3 to A4 will be granted to someone whose general rating is "very good" normally when he has from 15 to 18 years' reckonable experience and is between 40 and 44 years of age.

4. The complainants were not on the list of promotions for 1992 and each of them filed an internal appeal. In its report the Appeals Committee held that there had been a departure from the normal procedure and breach of equal treatment. The other staff member had not been on the list of those eligible for promotion which the Board had forwarded to the President and her record of performance had not met the minimum requirement. The Committee recommended promoting the complainants from appropriate dates in 1992 and paying them the difference in remuneration together with interest thereon at 10 per cent a year.

5. The President rejected the Appeals Committee's recommendations. In letters he wrote to the complainants on 8 February 1995 -- the decisions now impugned -- he said:

"... other information than only staff reports may be taken into account for the assessment of the merits of an individual staff member. Such may well include my own experience with a particular staff member, as well as social aspects or other circumstances not directly relating to the work performed by the staff member, but which are nevertheless of importance in view of the proper functioning of the Office."

6. The complainants contend that the principle of equal treatment precludes the President's taking account, as he did in this instance, of personal opinions and subjective criteria. In their submission the Promotion Board is the only body competent to list the qualified employees in order of merit on the strength of objective and comparable evidence such as length of reckonable experience and performance as recorded in staff reports.

7. The Organisation replies that the authority to decide on promotion rests exclusively with the President and the Promotion Board's list contains mere proposals. It further submits that both President and Board are free to take into account not only the general ratings in staff reports but also, subject to limited review by the Tribunal, any other criteria they think appropriate.

8. By minutes of 9 November 1992 the Promotion Board asked the competent "line managers" and reporting officers whether there had been any changes since the 1990-91 reporting period in the performance by Mr. Denk, Mr. Hofmann and the other staff member of their duties. The Board asked for the information by 4 December 1992. The replies about Mr. Denk and Mr. Hofmann were that the latest assessments of their performance held good. On 25 November 1992 the other staff member's supervisors wrote a note that was addressed to Mr. Huguet, who is in charge of the administration of performance reports, and was intended for the Promotion Board but contained statements totally irrelevant to the precise and unambiguous question that the Board had asked; it said, for example, that "applicants no more qualified" than the other staff member had been recruited "at around the same time in grade A4 and even A5". According to evidence provided by its members the Board neither saw that letter nor got the information it had asked for about the other staff member. The Tribunal does not accept the Organisation's argument that the Board had a duty to "ask for the requested information rather than rejecting [the other staff member's] candidature". Neither does it accept the Organisation's suggestion that the letter was sent but some members of the Board failed to consider it properly.

9. In its report of 17 December 1992 to the President the Board expressed the opinion as to the other staff member

that "The short period of three years and four months is not sufficient as a basis for a record of performance justifying a promotion to A4 with 16 years' experience". In comparing the merits of candidates it was not unreasonable for the Board to specify a minimum period in which their performance should be assessed.

10. The Organisation admits that it was the note of 25 November 1992 about the other staff member that "prompted" the President to promote her. To the extent that the letter referred to special circumstances relating to the performance of her duties the Board should have been put in a position to consider them. Article 49 of the Service Regulations and the guidelines laid down by the President for the Promotion Board establish a promotion procedure of which the fairness and impartiality are ensured as far as possible by the presence of staff representatives on the Board. If the Board is denied information it seeks or if a decision to promote is taken against the Board's advice and on the basis of considerations other than ability and the record of performance, as prescribed in Article 49(7) of the Service Regulations, then fairness and impartiality can no longer be ensured. The reasons given for the impugned decisions are inappropriate for the promotion procedure established by Article 49 and amount to denial of the equal treatment the complainants were entitled to.

11. The Organisation argues that even if there were irregularities in the other staff member's promotion the complainants would not be entitled on that account to promotion in 1992. That is so. Inasmuch as the complainants do not seek the quashing of the President's decision to promote the other staff member, the Tribunal will award each of them 3,500 German marks in moral damages for breach of the Service Regulations and of the principle of equal treatment and 1,000 marks in costs.

DECISION

For the above reasons,

1. The Organisation shall pay each of the complainants 3,500 German marks in damages.
2. It shall pay each of them 1,000 marks in costs.
3. Their other claims are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Miss Mella Carroll, Judge, and Mr. Mark Fernando, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 30 January 1997.

William Douglas
Mella Carroll
Mark Fernando
A.B. Gardner