

EIGHTY-EIGHTH SESSION

In re Créchet (No. 5)

Judgment 1910

The Administrative Tribunal,

Considering the fifth complaint filed by Mr Patrick Georges Michel Créchet against the European Patent Organisation (EPO) on 1 February 1999 and corrected on 7 April, the EPO's reply of 25 June, the complainant's rejoinder of 11 August and the Organisation's surrejoinder of 15 September 1999;

Considering Article II, paragraph 5, 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's career at the European Patent Office, the EPO's secretariat, is set out under A in Judgments 890 delivered on 30 June 1988 and 1667 delivered on 10 July 1997, in which the Tribunal ruled on his first and second complaints, and in Judgment 1879 delivered on 8 July 1999 in which it ruled on his third and fourth complaints. He was sent on mission as a liaison officer at grade A3 between the Office and the Portuguese National Industrial Property Institute in Lisbon from 1 May 1992 to 31 December 1995.

In a communication to staff dated 27 June 1997 the Personnel Office published a list of Directorate-General 1 staff who were to be promoted. The complainant was not on it. By a letter of 21 August he asked the President of the Office to add his name to the list. By a letter of 2 September the acting Director of Personnel rejected his request on the President's behalf. By a letter of 8 September to the President the complainant filed an appeal against the rejection. In a letter of 10 October 1997 the Director of Personnel Development informed the complainant that the President upheld his decision and had referred the case to the Appeals Committee. In its report of 7 August 1998 the Committee concluded that the complainant did not qualify for promotion and recommended rejecting the appeal. By a letter of 27 August 1998, the impugned decision, the Director of Personnel Development told the complainant that the President had decided to endorse that recommendation.

B. The complainant points out that the Promotion Board considered his case despite the fact that his performance reports for 1992-93 and 1994-95 had not been finalised within one year as required by communiqué 206 of 14 February 1992.

In considering his request for promotion the President did not take into account the successful outcome of his liaison work in Portugal which took place in "objectively difficult circumstances". He thereby disregarded certain relevant documents such as the EPO *Gazette* of 13 May 1991, the letter of 5 October 1995 from the Principal Director in charge of information on patents, and Judgment 1667 (*in re* Créchet No. 2).

He asks the Tribunal to quash the President's decision of 27 August 1998, to send the case back to the Organisation for a new decision on his promotion and to award him 1,000 German marks in costs.

C. In its reply the Organisation recalls that precedent allows the Tribunal only a limited power of review over discretionary administrative decisions such as those concerning promotion. In this case none of the conditions for quashing such a decision was met.

The general guidelines on reporting appended to communiqué 206 affected only indirectly the decision not to promote the complainant. What needs to be established is whether the criteria for promotion set in the "Note from the President to the Chairmen of the Promotion Boards" for 1996, which remained in force in

1997, were met or not. In fact they were not: the complainant had only fourteen years' experience instead of the requisite nineteen to twenty-three years, and had not yet reached the age of forty-four as the Note required. The fact that his performance reports for 1992-93 and 1994-95 had not been finalised when the Board was convened did not prevent it from coming to a decision about him and did not adversely affect him.

The EPO recalls that in Judgment 1667 under 6 the Tribunal recognised that "there was no direct promise as to what the decision would be" regarding promotion since such a "promise would have been untoward and presumably incompatible with any properly strict observance of the Service Regulations".

The complainant's reference to the "objectively difficult circumstances" of his mission is immaterial, the matter having already been dealt with in his third and fourth complaints.

D. In his rejoinder the complainant points out that, according to the President's Note, the Promotion Board may draw the President's attention to special cases "even where the usual requirements are not fully met".

The Administration "belittled" what he had accomplished in Portugal. He feels that he has been "mistreated". He would have done better to stay in The Hague where he would have been certain of promotion.

E. In its surrejoinder the Organisation presses its pleas. Before reaching a conclusion the Promotion Board did take account of the four years he spent in Portugal. There is nothing wrong with the recommendation it made, since the Board enjoys wide discretionary authority in such matters.

CONSIDERATIONS

1. The complainant's career and the facts at the origin of this case are summed up in Judgments 890, 1667 and 1879 on his four earlier complaints. Following an announcement in the EPO *Gazette* the complainant was chosen to serve as a liaison officer in Lisbon with the Portuguese authorities, more precisely with the Portuguese National Industrial Property Institute. He held that post from 1 May 1992 to 31 December 1995 when he was reassigned to Directorate-General 1 as an examiner at the same grade, A3.

The announcement in the *Gazette* of 13 May 1991 calling for applications for the Lisbon post said that "for career advancement special account [would] be taken of this experience, in the light of the liaison officer's contribution to the success of the mission". At the end of his stay in Lisbon the complainant inquired about the advancement he expected. By a letter of 5 October 1995 he was told that the Promotion Boards would "certainly take account" of the experience he had gained while on mission. Another letter of 5 October 1995 confirmed: "your performance as liaison officer will be recorded in your staff report which, as you know, can affect the advancement of your career". In a letter of 12 December 1995 he was further told, on the President's behalf, that his performance while on mission would be reflected in his staff report which would duly be taken into account for the advancement of his career.

Relying on those statements the complainant asked to be promoted independently of any performance appraisal and usual procedure for promotion. In Judgment 1667 (*in re* Créchet No. 2) the Tribunal upheld a decision rejecting that claim since it found that the announcement in the *Gazette* contained no such promise. However, it found that the reasonable construction to be put on the announcement was that:

"... success in liaison work should serve the advancement of the employee's career, first in the evaluation of his performance and then in assessing his qualifications for promotion or for appointment to some more desirable post ..."

It concluded then that:

"the text of the announcement gave the employee a limited assurance that a successful mission as liaison officer would be taken into account as a point in his favour whenever a decision was to be taken on promotion or on appointment ..."

That limited assurance, therefore, afforded no basis for claiming an appointment independently of any evaluation and promotion procedure.

Subsequently, in the procedure that led to the present complaint, the complainant asked to be put on a

promotion list submitted to the President. That claim was rejected under the guidelines on promotion. Although his performance reports refer to his work as a liaison officer, neither they nor the decision rejecting his claim show that at the time of the decision on his promotion, account was taken of the "limited assurance" recognised by Judgment 1667 that "a successful [mission] as liaison officer would be taken into account as a point in his favour".

2. The complainant bases his claim on the assurance given in the *Gazette* announcement.

The Organisation rebuts his claim on the grounds that he does not qualify for promotion under the "Note from the President to the Chairmen of the Promotion Boards". It submits that Judgment 1667 confers no rights on him. Besides, his work in Portugal was reflected in his reports and was taken into account in the decision rejecting his claim to promotion.

3. Contrary to what the EPO seems to assert in its written submissions, Judgment 1667 recognises that the text of the announcement gave a guarantee, albeit a limited one, entailing an obligation for the Office to take account of a successful outcome of his mission as liaison officer "as a point in his favour" whenever a decision was to be taken on promotion or appointment.

The Tribunal and the parties must abide by the findings of that judgment.

It should be noted that the limited assurance given by the EPO induced the complainant to apply for the post of liaison officer. The post demanded considerable investment on his part: it involved new duties, a move to a relatively distant country and the study of a new language *ab initio*. It would, therefore, have been natural to attach some importance to the additional effort required of the complainant if it proved successful.

However, it must be inferred from the impugned decision and the EPO's explanations that in the evaluation of his performance and then in the decision on promotion, account was not taken of successful work as liaison officer as a point in his favour over and above the general criteria for promotion set in the President's Note.

The report of the Appeals Committee and the EPO's reply and surrejoinder to this complaint state that the complainant did not fulfil two of the criteria set in the Note for the award of a promotion to grade A3 or A4, as he had not been given the rating "very good" for three successive reporting periods and had not yet reached the age of forty-four at the material time.

It should be noted that the text of the Note allowed the Promotion Boards - and hence the President - to derogate from the usual requirements in order to take account of special cases. Therefore, it was possible, since the complainant's was a special case, to examine whether, in the context of an overall evaluation taking account of success in liaison work, he deserved the promotion he sought.

The Organisation's failure to carry out such an examination deprives its decision of a legal basis. The decision must, therefore, be set aside. However, the Tribunal will not substitute its own assessment for that of the Organisation; it must, therefore, send the case back to the President for a new decision, after further examination if necessary. In the context of the overall evaluation the share to be attributed to success in the complainant's liaison work in Portugal should not be insignificant in view of the considerable additional effort required of him.

Since his case succeeds, the complainant is entitled to costs.

DECISION

For the above reasons,

1. The impugned decision is set aside and the case is sent back to the EPO for the President to take a new decision in accordance with 3 above.
2. The EPO shall pay the complainant 1,000 German marks in costs.

In witness of this judgment, adopted on 12 November 1999, 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 3 February 2000.

(Signed)

**Michel Gentot
Jean-François Egli
Seydou Ba**

Catherine Comtet

Updated by PFR. Approved by CC. Last update: 7 July 2000.